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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Michael Gallegos,  
10  
11 Petitioner,

12 v.

13 David Shinn, et al.,  
14 Respondents.

No. CV-01-01909-PHX-NVW

DEATH PENALTY CASE

**ORDER**

15  
16 In 2016, the Court of Appeals for the Ninth Circuit granted Petitioner Michael  
17 Gallegos’s motion for a partial remand of this case pursuant to *Martinez v. Ryan*, 566 U.S.  
18 1 (2012), and directed the Court to determine whether cause and prejudice existed to excuse  
19 the procedural default of his claim that “counsel failed to investigate and present mitigating  
20 evidence of Gallegos’s alleged organic brain damage.”<sup>1</sup> *Gallegos v. Ryan*, 842 F.3d 1123  
21 (9th Cir. 2016). The Court found that the default was excused and Gallegos was entitled  
22 to an evidentiary hearing on the merits of the claim. (*See* Doc. 160.) The hearing was held  
23 on November 9–10, 2020. Gallegos submitted a post-hearing brief. (Doc. 244.)

24 **I. BACKGROUND**

25 In 1990, Gallegos, age eighteen, raped and killed an eight-year-old girl. He was  
26 convicted of first-degree murder and sexual conduct with a minor and sentenced to death.<sup>2</sup>

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28 <sup>1</sup> *Martinez* held that the ineffective assistance of post-conviction counsel can excuse the  
procedural default of a claim of ineffective assistance of trial counsel. 566 U.S. at 17.

<sup>2</sup> The Court has discussed the facts of the crime elsewhere. (*See* Doc. 111 at 2–5.)

1 On direct appeal, the Arizona Supreme Court affirmed the convictions but remanded for  
2 re-sentencing on the murder conviction. *State v. Gallegos (Gallegos I)*, 178 Ariz. 1, 870  
3 P.2d 1097 (1994). On remand, the trial judge re-sentenced Gallegos to death. The Arizona  
4 Supreme Court affirmed. *State v. Gallegos (Gallegos II)*, 185 Ariz. 340, 916 P.2d 1056  
5 (1996).

6 After unsuccessfully pursuing post-conviction relief in state court, Gallegos filed a  
7 habeas petition in this Court in 2001 and an amended petition in December 2002. (Docs.  
8 1, 74.) The Court denied relief. (Doc. 111.)

9 On appeal to the Ninth Circuit, Gallegos raised claims of ineffective assistance of  
10 counsel at the guilt and sentencing phases of trial. In his 2009 opening brief, Gallegos  
11 argued that counsel failed to provide scientific evidence about his learning disability. (Case  
12 No. 08-99029, Dkt. 12.) Gallegos relied on a 2002 report by Dr. Nancy Cowardin, a  
13 psychologist with expertise in learning disabilities. (*Id.* at 41–42.) The Supreme Court  
14 issued its opinion in *Martinez* in March 2012. 566 U.S. 1. In June 2012, Gallegos moved  
15 for a stay and remand pursuant to *Martinez*. (Dkt. 46.) Citing the 2011 report of  
16 neuropsychologist Dr. Robert Heilbrunner, Gallegos argued that there was new evidence  
17 supporting his claim of ineffective assistance of counsel at sentencing; i.e., evidence that  
18 he “suffered from brain damage,” including damage caused by head injuries sustained in a  
19 series of ATV accidents.<sup>3</sup> (*Id.* at 15.) In April 2016, the court denied Gallegos’s ineffective  
20 assistance of counsel claims and rejected his motion for a stay and remand with respect to  
21 those claims.<sup>4</sup> *Gallegos v. Ryan*, 820 F.3d 1013 (9th Cir. 2016).

22 In May 2016, Gallegos filed a petition for rehearing and rehearing en banc. (Dkt.  
23 75.) He argued that the new “evidence of organic brain damage” fundamentally altered his  
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25 <sup>3</sup> All-Terrain Vehicle. The record also refers to ATCs (All-Terrain Cycles). For  
26 consistency’s sake the Court will use ATV to refer to this category of vehicles except when  
27 quoting the record.

28 <sup>4</sup> The court granted Gallegos’s motion to remand for consideration of a claim under *Brady*  
*v. Maryland*, 373 U.S. 83 (1963). This Court denied Gallegos’s request for a stay so that  
he could pursue his *Brady* claim in state court. (Doc. 130.)

1 claim of ineffective assistance of counsel at sentencing, which had previously alleged only  
2 that counsel erred by failing to present additional evidence of Gallegos's history of  
3 substance abuse, tendency to be a follower, and learning disability. (*Id.* at 5–6.)

4 On November 30, 2016, the Ninth Circuit amended its opinion, granted Gallegos's  
5 petition for rehearing, and ordered a partial remand to this Court. *Gallegos*, 842 F.3d 1123.

## 6 **II. APPLICABLE LAW**

7 Claims of ineffective assistance of counsel are governed by *Strickland v.*  
8 *Washington*, 466 U.S. 668 (1984). Under *Strickland*, a petitioner must show that counsel's  
9 representation fell below an objective standard of reasonableness and that the deficiency  
10 prejudiced the defense. *Id.* at 687–88. The inquiry is highly deferential, and “every effort  
11 [must] be made to eliminate the distorting effects of hindsight, to reconstruct the  
12 circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's  
13 perspective at the time.” *Id.* at 689.

14 Under *Strickland*, counsel has a duty to make reasonable investigations or to make  
15 a reasonable decision that makes particular investigations unnecessary. *Id.* at 691. A  
16 “decision not to investigate must be directly assessed for reasonableness in all the  
17 circumstances, applying a heavy measure of deference to counsel's judgments.” *Wiggins*  
18 *v. Smith*, 539 U.S. 510, 521–22 (2003) (quoting *Strickland*, 466 U.S. at 690–91).

19 Prejudice is proved by “show[ing] that there is a reasonable probability that, but for  
20 counsel's unprofessional errors, the result of the proceeding would have been different. A  
21 reasonable probability is a probability sufficient to undermine confidence in the outcome.”  
22 *Strickland*, 466 U.S. at 694. It is enough to show “a reasonable probability that at least  
23 one juror” would have recommended a sentence of life instead of death. *Wiggins*, 539 U.S.  
24 at 537; see *Summerlin v. Schriro*, 427 F.3d 623, 643 (9th Cir. 2005) (explaining, in the  
25 context of judge sentencing, that prejudice exists where, “[h]ad an adequate mitigation  
26 defense been presented, there is ‘a reasonable probability’ that an objective sentencing  
27 factfinder ‘would have struck a different balance’”) (quoting *Wiggins*, 539 U.S. at 537).

## 28 **III. OVERVIEW**

1 At issue is Gallegos's claim that resentencing counsel performed ineffectively by  
2 failing "to investigate and present mitigating evidence of Gallegos's alleged organic brain  
3 damage." *Gallegos*, 842 F.3d 1123. Review of the claim is *de novo*.

4 Gallegos asserts that he suffers from three types of brain damage or dysfunction:  
5 specific learning disability ("SLD"); damage from alcohol and substance abuse; and  
6 damage resulting from traumatic brain injuries ("TBI"), including injuries sustained in  
7 ATV accidents. (*See* Doc. 227 at 8.) He alleges that resentencing counsel performed  
8 ineffectively by failing to investigate and present such evidence despite "red flags" in the  
9 record. (*Id.*) He contends that the following information would have been revealed  
10 through a proper mitigation investigation: "(1) Gallegos's learning disability was a brain-  
11 based disorder that caused significant cognitive deficits and affected his behavior, (2) his  
12 substance abuse as an adolescent may have impaired his brain development, and (3)  
13 multiple accidents with head injuries possibly resulted in further impairments to his already  
14 impaired brain." (*Id.* at 21.)

15 Respondents argue that there is no objective evidence Gallegos ever suffered TBI  
16 and no way to distinguish the effects of possible head injuries from the effects of Gallegos's  
17 substance abuse. (*Id.* at 12.) They also assert that "the tests, technology, and theories  
18 surrounding adolescent organic brain damage that exist today, were not widely accepted in  
19 the scientific community" at the time of Gallegos's resentencing. (*Id.* at 16–17.)

20 The parties have stipulated that Gallegos has a learning disability, that he had  
21 substance abuse issues, and that he was involved in ATV accidents. (*Id.* at 3–4.)

22 The parties disagree about the scope of the remand. Gallegos argues that the phrase  
23 "organic brain damage" as used by the Ninth Circuit refers to damage beyond that  
24 purportedly caused by TBI. (*See* Doc. 244 at 5–9.) The Court agrees. As explained below,  
25 the testimony at the evidentiary hearing indicated that "organic brain damage"  
26 encompasses the damage reflected in Gallegos's learning disability and the damage  
27 potentially caused by his substance abuse and TBI.

28 **IV. BACKGROUND**

1                   **1. Initial sentencing**

2                   At the guilt phase of trial, Gallegos’s mother testified about his learning disability  
3 and alcohol consumption. (RT 3/13/91 at 23–32.) Gallegos himself testified that he  
4 suffered from a learning disability. He also detailed his alcohol consumption on the day  
5 of the crimes. (*Id.* at 34–35, 37–41, 42–58, 84–90, 112–16.)

6                   Following Gallegos’s conviction, counsel moved for a “diagnostic evaluation.”  
7 (ROA 119.) The court granted the motion and appointed Dr. John DiBacco to evaluate  
8 Gallegos and determine whether, at the time of the crime, his “capacity to appreciate the  
9 wrongfulness of his conduct or to conform his conduct to requirements of the law was  
10 significantly impaired, but not so impaired as to constitute a defense to the prosecution.”  
11 (ROA 122; *see* Pet’s Ex. 39.)<sup>5</sup> Dr. DiBacco found that Gallegos was competent and did  
12 appreciate the wrongfulness of his conduct but also detailed Gallegos’s learning disability,  
13 substance abuse problems, poor judgment and insight, and impulsivity. (Pet’s Ex. 39 at 4–  
14 6.) He also noted that during the exam Gallegos was experiencing back pain from an ATV  
15 accident. (*Id.* at 2.) Dr. DiBacco diagnosed Gallegos with adjustment disorder with mixed  
16 emotional features; alcohol dependence; rule-out alcohol abuse; cannabis dependence;  
17 rule-out cannabis abuse; rule-out psychoactive substance abuse, NOS; and personality  
18 disorder, NOS. (*Id.* at 6.)

19                   Counsel prepared a sentencing memorandum and attached reports written by  
20 Gallegos’s juvenile probation officer, Noah Stalvey. (ROA 127.) The reports noted that  
21 Gallegos was a learning-disabled student with poor attendance and poor grades. They also  
22 stated that “Gallegos is a young man who apparently has not developed the ability to think  
23 before he acts” and “tends to behave impulsively and allows himself to become involved  
24 in a situation without considering the consequences.”

25                   At the sentencing hearing, the State rested on the record with respect to the  
26 aggravating factors—that the murder was especially cruel, heinous, or depraved and the  
27 victim was under fifteen. (RT 5/24/91 at 6.) In mitigation, defense counsel called  
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<sup>5</sup> “Pet’s Ex.” refers to the exhibits prepared for the evidentiary hearing. (*See* Doc. 235.)

1 Gallegos's father, mother, brother, and sister, all of whom testified that Gallegos was a  
2 good person from a good family and was remorseful for his actions. (RT 5/24/91 at 21–  
3 30.) Stalvey also testified, sharing his opinion that Gallegos was the least likely of his  
4 clients to commit this type of crime. (*Id.* at 16.) He also testified that Gallegos tended to  
5 act impulsively and was a follower rather than a leader. (*Id.* at 15, 19–20.)

6 Detectives Michael Chambers and Armando Saldate Jr., the lead investigators in the  
7 case, testified that they did not believe the death penalty was appropriate for Gallegos. (*Id.*  
8 at 30–41.) Detective Chambers testified that in his view Gallegos was “unsophisticated”  
9 and “less than his chronological age.” (*Id.* at 39–40.)

10 Finally, Gallegos took the stand, reading a statement that expressed his remorse for  
11 the victim's death and attributing his actions to drug and alcohol impairment. (*Id.* at 42–  
12 43.)

13 Counsel submitted Dr. DiBacco's report (*id.* at 57–58, 65) and letters advocating a  
14 life sentence. Also before the court was the presentence investigation report, which  
15 included information about Gallegos's substance abuse history and mental health, and the  
16 comments of a counselor who described Gallegos as “definitely a follower and not a  
17 leader.” (ROA 131 at 6.)

18 In its order, the trial court found that the two aggravating factors had been proved.<sup>6</sup>  
19 (*Id.* at 65–68.) With respect to statutory mitigating circumstances, the court found that  
20 Gallegos failed to prove, pursuant to A.R.S. § 13–703(G)(1), that his capacity to appreciate  
21 the wrongfulness of his conduct or to conform his conduct to the requirements of law was  
22 significantly impaired.<sup>7</sup> (*Id.* at 68.) In doing so, the court considered Gallegos's  
23 “documented” history of drinking and substance abuse and his “documented learning  
24 disability.” (*Id.* at 70–71.) The court found that Gallegos's learning disability affected his  
25 “math and spelling but not his reading or understanding.” (*Id.* at 71.) The court cited Dr.

26  
27 <sup>6</sup> Gallegos was sentenced prior to the Supreme Court's decision in *Ring v. Arizona*, 536  
28 U.S. 584, 609 (2002), which held that a jury, not a judge, must make the findings that  
render a defendant eligible for death.

<sup>7</sup> Since renumbered as A.R.S. § 13–751.

1 DiBacco's conclusion that Gallegos had "normal language skills, at least average fluid  
2 intelligence and was not mentally deficient" and that while Gallegos "may have been  
3 intoxicated at the time of the crime, he did appreciate the wrongfulness of his act." (*Id.*)  
4 The court found that Gallegos's age was a statutory mitigating circumstance. (*Id.* at 73.)

5 The court found that Gallegos had established as nonstatutory mitigating  
6 circumstances his remorse and the recommendations of leniency from the detectives. (*Id.*  
7 at 74.)

8 The court concluded that the mitigating evidence was not sufficiently substantial to  
9 outweigh the two aggravating factors and that "each aggravating circumstance . . . standing  
10 alone outweighs the total mitigation." (*Id.* at 75.)

11 On direct appeal, the Arizona Supreme Court remanded the case for resentencing,  
12 finding that the trial court had failed to consider Gallegos's impairment at the time of the  
13 crimes as a potential nonstatutory mitigating circumstance. *Gallegos I*, 178 Ariz. at 21–  
14 23, 870 P.2d at 1117–19.

## 15 **2. Resentencing**

16 John Antieau represented Gallegos on appeal and during his 1994 resentencing  
17 proceedings.<sup>8</sup> Prior to the resentencing hearing, he sought and the court authorized the  
18 appointment of investigator Mary Durand and Dr. C.J. Shaw, an addiction specialist.  
19 (ROA 154.) Dr. Shaw prepared a report opining that Gallegos's blood alcohol level at the  
20 time of the crimes was 0.2 or higher. (ROA 161; *see* RT 10/24/94 at 142.)

21 Although the case was remanded with directions to consider impairment as a  
22 mitigating circumstance, the trial court agreed with defense counsel that the resentencing  
23 hearing would not be limited to that issue. (RT 10/24/94 at 32.) Counsel presented  
24 testimony from Gallegos and his family and friends regarding his drug and alcohol use,  
25 learning disability, tendency to be a follower, and passive, nonviolent personality.

26 Gallegos testified that he suffered from a learning disability, was a "slow learner,"  
27 and was placed in special education classes starting in the fourth grade. (*Id.* at 6.) He

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28 <sup>8</sup> Antieau passed away in 2000.



1 testified that he began drinking alcohol at age twelve or thirteen and began using marijuana  
2 in sixth or seventh grade and methamphetamine in tenth or eleventh grade. (*Id.* at 6–7.)  
3 His conduct deteriorated when George Smallwood arrived at his home.<sup>9</sup> (*Id.* at 8–9.) On  
4 the day of the murder he and Smallwood drank scotch, schnapps, and beer in the morning,  
5 smoked two joints, and then drank beer throughout the afternoon and night. (*Id.* at 11–12.)  
6 Gallegos testified that the crimes would not have happened if he had not been impaired and  
7 Smallwood had not been present. (*Id.* at 13.)

8 Gallegos’s mother, Hortensia, testified that from second grade on he had attended  
9 special education classes due to his learning disability. (*Id.* at 54.) He was tested at the  
10 beginning of every school year and remained in special education through twelfth grade.  
11 (*Id.*) Mrs. Gallegos testified that Gallegos had a tendency to take the blame for things other  
12 people did. (*Id.* at 55.)

13 Mrs. Gallegos testified that she became aware of Gallegos’s drug use when he was  
14 in junior high. (*Id.* at 56.) She testified that Smallwood was violent and a bad influence;  
15 he exerted control over Gallegos and Gallegos followed his lead. (*Id.* at 58.)

16 Gallegos’s sister Margaret testified that she was aware of his drug and alcohol use  
17 in the years before the murder. (*Id.* at 63–64.) She stated that Gallegos was nonviolent  
18 and mellow when intoxicated. (*Id.* at 64–65.) She testified that after Smallwood arrived  
19 Gallegos’s behavior changed; he became sullen and withdrawn and abandoned his old  
20 friends. (*Id.* at 66.)

21 Another sister, Maria, became aware of Gallegos’s drug and alcohol use when he  
22 was in seventh grade. (*Id.* at 71.) She too indicated that Gallegos became mellow when  
23 drinking, and described him as following Smallwood’s lead. (*Id.* at 72–74.) She testified  
24 that Smallwood was a bad influence on Gallegos, who began to drink more and became  
25 rebellious. (*Id.* at 76.)

26 Gallegos’s brother-in-law testified that Gallegos began drinking at age 13 or 14.  
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28 <sup>9</sup> Smallwood, a friend of Gallegos and the victim’s half-brother, was present with Gallegos during the crimes but charges against him were dropped.



1 (*Id.* at 83.) He too had observed that Gallegos became mellow under the influence of drugs.  
2 (*Id.*)

3 Gallegos's niece Michell Emig testified that he started drinking in junior high. (*Id.*  
4 at 96.) He began to drink every day and used marijuana and crystal meth. (*Id.*) Gallegos  
5 was mellow when drunk. (*Id.* at 97.) Emig testified that Smallwood was the leader and  
6 Gallegos the follower. (*Id.* at 98.)

7 Several other friends and acquaintances testified that Gallegos was mellow and non-  
8 combative when under the influence and that he was a passive follower in his relationship  
9 with Smallwood. (*Id.* 87, 89, 117–19, 128–30, 136, 138–39.)

10 Counsel again presented the testimony of Detectives Saldate and Chambers.  
11 Detective Chambers testified in support of a life sentence based on his opinion that the  
12 killing was accidental and that Gallegos had been drinking at the time of the crimes. (*Id.*  
13 at 43–45.)

14 At the close of the hearing, the court indicated that in making its decision it would  
15 consider mitigating evidence from the first sentencing hearing, including the testimony of  
16 Jerry Gallegos Jr., Gallegos's older brother, and Noah Stalvey. (*Id.* at 112.) Counsel did  
17 not offer Dr. DiBacco's report. (*Id.* at 112–13.)

18 The State again did not present any evidence in support of the aggravating factors,  
19 relying on the evidence presented at trial.

20 In sentencing Gallegos, the court again rejected impairment as a statutory mitigating  
21 factor. (*Id.* at 182.) The court repeated its finding that Gallegos "has a documented  
22 learning disability" . . . that "affects his math and spelling but not his reading or  
23 understanding. There is no evidence that the defendant is mentally deficient." (*Id.* at 185.)  
24 The court found that Gallegos's impairment and substance abuse history constituted  
25 nonstatutory mitigating circumstances but that they, together with the other mitigation  
26 evidence, did not outweigh the aggravating factors. (*Id.* at 189–90.) The court stated that:  
27 "Even if the Arizona Supreme Court told this court to weigh the alcohol and drug history  
28 and impairment ten times, this court would still find that each aggravating circumstance

1 standing alone would outweigh all collective mitigation.” (*Id.* at 189–90.)

2 The Arizona Supreme Court affirmed. *Gallegos II*, 185 Ariz. at 347–48, 916 P.2d  
3 at 1063–64.

4 **3. ACRP Investigation**

5 During the resentencing proceedings, the Arizona Capital Representation Project  
6 (“ACRP”) offered Antieau assistance, which he accepted. (Pet’s Ex. 4 at 4.) ACRP staff  
7 discussed with Antieau the need to present a different mitigation case from the one offered  
8 at the original sentencing. (*Id.* at 5.) In August 1994, Melodee Nowatzki, a mitigation  
9 specialist for the ACRP, faxed Antieau memoranda from witness interviews she had  
10 conducted. (*See id.* at 38.) These documents, which contained information that Gallegos  
11 had been injured in ATV accidents, are found in Antieau’s file. (Pet’s Ex. 2.)

12 In an interview with Nowatzki dated April 15, 1995, Gallegos described an  
13 accident that happened when he was about 16. (Pet’s Ex. 2 at 411.) He was drunk and  
14 drove an ATV into a tree. He “chipped both front teeth . . . but didn’t wreck the ATV too  
15 badly.” (*Id.*)

16 He described another accident that happened in the summer before tenth grade.  
17 Gallegos went to a birthday party. (*Id.*) He was drunk and rode as a passenger on an ATV.  
18 The driver, also drunk, crashed into a tree going about 50 mph. (*Id.* at 411.) The driver  
19 broke his neck and was air-evacuated to the hospital. (*Id.*) Gallegos, who was not wearing  
20 a helmet, was “thrown into a bunch of rocks and landed face first.” (*Id.*) He broke his nose  
21 and his glasses flew off. (*Id.*) Gallegos flagged down a car, and they called for an  
22 ambulance. (*Id.*) Although Gallegos had “hurt his leg and his head,” he left when the  
23 ambulance arrived because he had been drinking under age. (*Id.*)

24 Another account of that accident was offered by Gallegos’s niece Michelle Emig,  
25 who provided the following information to Nowatzki:

26 **MICHAEL’S ATC ACCIDENT:**

27 Someone had a police scanner and heard there was an accident and that the  
28 police were coming. Everyone was leaving in their cars, but Michelle

1 couldn't find Michael. Ten minutes later some older kids brought Michael  
2 back in a truck. Michael just sat there, looking dazed from the accident. . .

3 Michael just sat there going "Whoa! That was a trip—I think that guy really  
4 got hurt."

5 Michael seemed dazed and spent the night at Margaret's house because he  
6 had been out too late. Michael was not overly drunk at the time because they  
7 had only been at the party for about 10 minutes. Michael seemed dazed all  
8 night and was sore afterward. Michael said he jumped off before the cycle  
9 hit the tree. The driver was paralyzed from the neck down and was taken  
10 away by ambulance.

11 (*Id.* at 669–70.)

12 Todd Emig, Michelle's husband, told Nowatzki that: "At the cedars, in cinder hills  
13 near cinder lake, Michael rode ATC's. There was a big party there and Michael had a  
14 serious accident there." (*Id.* at 664.)

15 Richard Wilson, a friend of Gallegos, reported that: "One time, a guy was driving  
16 his brother's 4-wheel; Mike jumped off, the guy hit a tree; Mike had some scratches." (*Id.*  
17 at 628.)

18 Another friend, Anthony Duran, told Nowatzki that "[e]veryone heard that the guy  
19 is paralyzed from the waist down from hitting the tree on the ATC. The marks are still  
20 visible on the tree." He continued: "Michael's ATC accident happened by Timberline,  
21 before Cinderlake [sic]. You can see the marks on the tree where it happened. Michael  
22 was in shock after the accident. He was pale, and looked that way for 1 hour." (*Id.* at 705–  
23 06.)

24 Duran also noted a prior accident: "At Richard's party, Michael wrecked Richard's  
25 ATC, lost his glasses until the next day. Tony remembers Michel being out on [sic] street  
26 looking for his glasses." (*Id.* at 705.)

27 Finally, Nowatzki reported that Hortensia Gallegos, Gallegos's mother, once  
28 "noticed that Michel had a chipped tooth and asked Michael what happened to his front  
tooth. He said that he had been ATC riding and hit a tree." (*Id.* at 688.)

Antieau did not investigate this evidence or present it at resentencing, nor did he

offer any expert testimony with respect to learning disabilities or the effects of substance abuse on the brain.

## **V. HABEAS PROCEEDINGS & EVIDENTIARY HEARING**

During the course of these habeas proceedings, Gallegos's counsel have retained a number of experts. They include Drs. Cowardin and Heilbronner; Dr. David Fassler, a child and adolescent psychiatrist; and Dr. David Reschly, a psychologist with expertise in learning disabilities and special education. Drs. Heilbronner, Fassler, and Reschly testified at the evidentiary hearing on remand. Respondents retained one expert, Dr. Corwin Boake, a neuropsychologist. He also testified at the evidentiary hearing on remand.

At the hearing Gallegos presented evidence from twelve lay witnesses: Aaron Barrett, a friend of Gallegos; Statia Peakheart, an attorney with the ACRP; Russell Randall, one of Gallegos's special education teachers; Jerry Gallegos Jr.; Hortensia Gallegos; Margaret Gallegos; Michelle Emig; Anthony Duran; Mary Durand, the defense investigator; Melodee Nowatzki; Sally Ake, one of Gallegos's special education teachers; and Noah Stalvey. The Court accepted the declarations of Barrett, Peakheart, and Randall in lieu of live testimony. (*See* Doc. 218; RT 11/09/20 at 109.) The Court admitted the 2020 declarations of the remaining lay witnesses in lieu of direct testimony but allowed live cross-examination. (*Id.*)

### **1. Lay witnesses**

#### ***a. Aaron Barrett***

Barrett was a friend of Gallegos. In his 2020 declaration (Pet's Ex. 6), he writes that Gallegos had "difficulty learning anything beyond simple mechanical concepts." (*Id.*, ¶ 4.) Gallegos "struggled socially with the fact that he was in special education classes." (*Id.*, ¶ 5.) Barrett and Gallegos experimented with drugs together but drifted apart in their senior year. (*Id.*, ¶ 6.)

#### ***b. Statia Peakheart***

In her 2020 declaration (Pet's Ex. 15), Peakheart writes that Gallegos's case was assigned to her when she was with the ACRP and she provided assistance to Antieau. (*Id.*,

¶ 6.) She learned that Antieau was not meeting with Gallegos. (*Id.*) When she met with Gallegos, she got the impression he was intellectually impaired. (*Id.*) She spoke with mitigation specialist Nowatzki about evidence Nowatzki had discovered concerning Gallegos’s mental health, cognitive deficits, and ATV accidents. (*Id.*, ¶ 8.) The evidence was forwarded to Antieau on the assumption that he would investigate further, but he failed to continue the mitigation investigation. (*Id.*, ¶¶ 8, 9.)

**c. *Russell Randall***

Randall was Gallegos’s special education teacher in eleventh and twelfth grade. He did not testify during the state court proceedings, but he wrote a letter in 1991 on Gallegos’s behalf. In his 2020 declaration, Randall quotes from the letter in which he stated that Gallegos was “friendly” and “cooperative” and “generally worked up to his academic ability” but was “hindered by his learning disability.” (Pet’s Ex. 16, ¶ 4.) Randall was not contacted by resentencing counsel. (*Id.*, ¶ 5.)

In his declaration Randall describes Gallegos as lower functioning than his special education peers. (*Id.*, ¶6.) Gallegos was a follower, not a leader; he was “gullible and immature” and would gravitate toward peer groups that got into trouble. (*Id.*, ¶¶ 4, 7.) Gallegos acted without thinking about consequences and had deficits in reflective reasoning; “once he found himself in a troubling situation, he could not figure his way out.” (*Id.*, ¶ 8.) His “disability left him more like a 13-year-old in a 17 or 18-year old body.” (*Id.*) Gallegos could not cope with his emotions and was “easily frustrated.” (*Id.*, ¶ 9.) He had low self-esteem and was “severely depressed”; Randall regarded him as a suicide risk. (*Id.*, ¶ 10.) Randall believed Gallegos used alcohol to “cover his emotional pain.” (*Id.*, ¶ 11.)

**d. *Jerry Gallegos Jr.***

Gallegos Jr., Gallegos’s older brother, testified at the 1991 sentencing and provided declarations in 2002, 2017, and 2020. In his 2020 declaration (Pet’s Ex. 11), Gallegos Jr. states that Gallegos was involved in 40–50 ATV wrecks. (*Id.*, ¶ 4.) Gallegos Jr. describes several of the accidents. In one, Gallegos lost control of his ATV and rolled down a hill;

1 the ATV “smashed into him the entire way down.” (*Id.*, ¶ 5.) In another, Gallegos crashed  
2 his ATV into the side of Gallegos Jr.’s truck; he “flew off” the vehicle and crashed into the  
3 side door. (*Id.*, ¶ 6.) “His face and body were bleeding heavily but he just got up and  
4 licked off the blood.” (*Id.*) At age 16, Gallegos crashed after hitting a tree root while going  
5 40 mph. (*Id.*, ¶ 7.) “He must have suffered a tremendous blow to the head,” because his  
6 helmet broke into pieces when he removed it. (*Id.*) “He appeared dazed and as if he was  
7 trying to figure out what happened to him.” (*Id.*) Gallegos was not taken to the hospital  
8 because he said he was fine. (*Id.*)

9 Gallegos Jr. states that Gallegos “didn’t always think things through.” (*Id.*, ¶ 10.)  
10 He was a “slow learner” and had “difficulty reading.” (*Id.*, ¶ 11.)

11 Finally, Gallegos Jr. states that neither trial counsel, Antieau, nor Durand asked him  
12 about Gallegos’s possible head injuries or learning disability. (*Id.*, ¶ 23, 24.)

13 In his testimony at the evidentiary hearing, Gallegos Jr. acknowledged that he did  
14 not disclose information about Gallegos’s ATV accidents and possible head injuries at  
15 sentencing or during the 1994 resentencing proceedings when he was interviewed by  
16 Nowatzki. (RT 11/9/20 at 34–35.) He did not mention the accidents in his 2002  
17 declaration. (*Id.* at 36.) In his 2017 declaration he discussed the incident where Gallegos  
18 crashed into his truck, but did not note concerns about a head injury. (*Id.* at 37.) He  
19 testified that he would have sought medical attention for Gallegos after the accidents if he  
20 were concerned about his condition, but “he seemed fine.” (*Id.* at 38.) Gallegos Jr. would  
21 have shared the information about the accidents if he had been asked. (*Id.* at 39.)

22 *e. Hortensia Gallegos*

23 Hortensia is Gallegos’s mother. She testified at the 1991 sentencing and 1994  
24 resentencing and provided declarations in 2002, 2017, and 2020. In her 2020 declaration  
25 (Pet’s Ex. 10), she states that Gallegos had difficulty understanding and following  
26 instructions. (*Id.*, ¶ 3.) He was more immature than her other children, which “caused him  
27 to be more reckless and exhibit poor judgment.” (*Id.*, ¶ 5.) He had trouble learning and  
28 was placed in special education classes. (*Id.*, ¶ 6.) Once when Gallegos was in high school,

1 Mrs. Gallegos noticed that he had a chipped tooth; he later told her that had hit a tree in an  
2 ATV accident. (*Id.*, ¶ 8.) Neither sentencing counsel, resentencing counsel, nor Durand  
3 asked her about Gallegos’s “learning disabilities, mental health, or history of accidents or  
4 head injuries.” (*Id.*, ¶ 12.) Instead, they were focused on Gallegos’s drug and alcohol  
5 abuse. (*Id.*, ¶ 12.) Mrs. Gallegos did inform Nowatzki about the accident where Gallegos  
6 chipped his tooth. (*Id.*, ¶ 13.)

7 At the evidentiary hearing, Mrs. Gallegos acknowledged that in her testimony at  
8 sentencing and resentencing she discussed Gallegos’s learning disability, substance abuse,  
9 and the influence of George Smallwood, but did not provide information about Gallegos’s  
10 ATV accident or express concerns about possible head injuries; nor did she provide such  
11 information in her 2002 declaration. (RT 11/9/20 at 43–45.)

12 *f. Margaret Gallegos*

13 Margaret, Gallegos’s older sister, testified at both sentencing and resentencing and  
14 provided declarations in 2002, 2017, and 2020. In her 2020 declaration (Pet’s Ex. 13), she  
15 notes that one of the effects of Gallegos’s learning disability was his difficulty in  
16 processing information. (*Id.*, ¶ 3.) She states that Gallegos was “embarrassed and  
17 ashamed” to be in special education. (*Id.*, ¶ 4.) She describes hearing about an accident  
18 where Gallegos was the passenger on an ATV and the driver lost control, hit a tree, and  
19 was left paralyzed. (*Id.*, ¶ 5.) Gallegos flew off the ATV after rolling several times. (*Id.*)  
20 He was not wearing a helmet. (*Id.*) He had scrapes on his arm, scratches on his face, and  
21 a broken tooth. (*Id.*) Margaret was worried about him because he had “visible injuries and  
22 likely a head injury, as he was complaining his head hurt.” (*Id.*, ¶ 6.) She wanted to take  
23 him to the hospital but he refused to go. (*Id.*) She states that she called Antieau to complain  
24 about his lack of effort during the resentencing proceedings, but he did not return her calls.  
25 (*Id.*, ¶ 7.) At resentencing, Antieau focused on Gallegos’s drinking and did not seem  
26 interested in his learning disability or ATV accidents. (*Id.*, ¶ 8.)

27 At the evidentiary hearing, Margaret acknowledged that she did not mention  
28 Gallegos’s ATV accidents in her testimony at the 1991 sentencing, in a letter she wrote to



1 counsel in 1991, when interviewed by Nowatzki in 1994, or in her testimony at  
2 resentencing. (RT 11/9/20 at 47–49.) She reported the ATV accident in her 2002  
3 declaration, stating that Gallegos had a chipped tooth and scrapes on his arms but not  
4 mentioning a head injury or describing Gallegos’s demeanor. (*Id.* at 50.) She provided  
5 more information about the accident in her 2017 declaration. (*Id.*)

6 ***g. Michelle Emig***

7 Emig, Gallegos’s niece, testified at the 1994 resentencing and provided declarations  
8 in 2002, 2017, and 2020. In her 2020 declaration (Pet’s Ex. 9), she states that she was  
9 interviewed in 1994 by a defense investigator. (*Id.*, ¶ 3.) She told the investigator that  
10 Gallegos was involved in an ATV accident which left the driver paralyzed. (*Id.*) She  
11 provided the identities and contact information of people who were present at the time of  
12 the accident. (*Id.*, ¶ 4.) She states that she and Gallegos went to his sister Margaret’s house  
13 after the accident. (*Id.*, ¶ 5.) He seemed “dazed, confused, and in pain.” (*Id.*) He had lost  
14 his glasses and chipped a tooth. (*Id.*) Emig also discusses a second accident in which  
15 Gallegos crashed his ATV into the side of a truck. (*Id.* at ¶ 6.) She was not asked to testify  
16 about the ATV accidents or head injuries at the resentencing hearing. (*Id.*, ¶ 8.)

17 In her testimony at the evidentiary hearing, Emig acknowledged that she did not  
18 mention Gallegos’s ATV accidents and possible head injuries in a letter she wrote to  
19 counsel in 1991 or during her testimony at resentencing. (RT 11/9/20 at 54.) She testified  
20 that when interviewed in 1994 she told Nowatzki about the ATV accident in which the  
21 driver was paralyzed. (*Id.* at 55.) She did not witness the crash, but saw Gallegos  
22 afterwards and he looked “dazed” and was “sore.” (*Id.* at 56.) He said that he had jumped  
23 off the ATV before it hit the tree. (*Id.*) In her 2002 declaration, Emig stated that after the  
24 accident Gallegos held his hand to his head but she did not include that information in her  
25 later declarations. (*Id.*)

26 Emig testified that she did not notice any changes in Gallegos’s behavior after the  
27 accident. (*Id.* at 57.) She also testified that in high school Gallegos drank to excess every  
28 day and most days used some kind of drug. (*Id.* at 58.) She testified that she could not be

1 sure Gallegos sustained any head injuries from the accident. (*Id.* at 59.)

2 ***h. Anthony Duran***

3 Duran was Gallegos's friend from elementary to high school. He testified at the  
4 1994 resentencing hearing and provided declarations in 2017 and 2020. In his 2020  
5 declaration (Pet's Ex. 7), he states that Gallegos had trouble understanding the  
6 consequences of his actions and was gullible and easy to manipulate. (*Id.*, ¶¶ 3, 4.) Duran  
7 states that in 1994 he disclosed two ATV accidents to a defense investigator, including the  
8 one in which Gallegos was a passenger and the driver crashed into a tree. (*Id.*, ¶6, 7.)  
9 When Duran saw Gallegos after the accident, he looked "dazed, confused, and  
10 disoriented." (*Id.*, ¶ 8.) The ATV was "completely destroyed." (*Id.*, ¶ 9.) In the second  
11 accident Gallegos had been riding by himself; when he returned to camp after walking a  
12 mile from the site of the accident he was "pale and in shock"; he "must have suffered a  
13 very powerful blow to the head." (*Id.*, ¶ 10.)

14 When Duran met with Antieau before the 1994 resentencing, Antieau did not ask  
15 any questions about the ATV accidents or about Gallegos's mental difficulties, gullibility,  
16 and impulsivity. (*Id.*, ¶ 11, 13.) Duran states that Antieau "always looked tired and seemed  
17 like he was falling asleep" and "behaved strangely" in court. (*Id.*, ¶ 12.)

18 At the evidentiary hearing, Duran testified that Gallegos drank often in high school,  
19 started smoking marijuana at age 14, and took acid and mushrooms. (11/9/20 at 61–62.)  
20 He testified that he did not witness the ATV accident where Gallegos was a passenger and  
21 the driver was paralyzed. (*Id.* at 62.) He described Gallegos after that accident as  
22 disoriented or having a hard time realizing where he was. (*Id.* at 63.) He asked Gallegos  
23 if he wanted to go to the hospital but Gallegos refused; today, as an adult, Duran "think[s]  
24 we send somebody to the hospital like that." (*Id.*) He testified that he believed Gallegos  
25 did suffer a head injury but could not say for sure. (*Id.* at 65.)

26 ***i. Mary Durand***

27 Durand was the defense team's investigator. She did not testify during the state  
28 court proceedings. She provided declarations in 2017 and 2020. In her 2020 declaration

1 (Pet’s Ex. 8), she opines that “Mr. Antieau ignored the prevailing professional norms which  
2 dictated the need to conduct a thorough mitigation investigation.” (*Id.*, ¶ 4.) She states  
3 that Antieau was provided with Nowatzki’s notes which contained evidence that Gallegos  
4 “suffered from learning disabilities and . . . had sustained prior head injuries.” (*Id.*, ¶ 6.)  
5 According to Durand: “This evidence raised an obvious red flag that Mr. Gallegos might  
6 suffer from serious brain abnormalities.” (*Id.*) Durand urged Antieau to investigate  
7 Gallegos’s cognitive deficits and brain impairments, but he failed to do so. (*Id.*, ¶¶ 10, 11.)  
8 Durand states that she was aware Antieau had “a very serious problem with drugs and  
9 alcohol,” which interfered with his performance and caused him to miss meetings with her  
10 and with Gallegos’s family. (*Id.*, ¶ 13.)

11 In her testimony at the evidentiary hearing, Durand acknowledged that the interview  
12 notes provided to Antieau by the ACRP discussed Gallegos’s medical history, learning  
13 disability, education, and substance abuse history but did not specifically mention brain  
14 injury. (RT 11/9/20 at 68–69.) While the notes detailed Gallegos’s ATV accidents, they  
15 also show that he was never taken to the hospital for medical treatment. (*Id.* at 70.) Durand  
16 testified that although the notes documenting her conversations with Antieau are missing  
17 from her file, she did discuss with him her concerns about the scope of his mitigation  
18 investigation. (*Id.* at 71–73.) The notes that are present do not mention concerns Durand  
19 might have had about the issues of brain damage or cognitive impairment. (*Id.* at 73.) She  
20 testified, however, that she did raise those topics in her conversations with Antieau. (*Id.*)  
21 Durand “felt very strongly that Antieau did not do a good job in this case.” (*Id.* at 75.)

22 **j. Melodee Nowatzki**

23 Nowatzki was a mitigation investigator for the ARCP. She provided declarations  
24 in 2017 and 2020. In her 2020 declaration (Pet’s Ex. 14), she states that she received  
25 evidence about Gallegos’s head injuries, gathered his school records, and provided all of  
26 the information to Antieau with the expectation that he would use the evidence to  
27 investigate whether Gallegos had brain impairments resulting from his learning disability  
28 and head injuries. (*Id.*, ¶¶ 8, 9.)

1 At the evidentiary hearing, Nowatzki testified that she worked under the auspices  
2 of attorney Karen Fischer. (RT 11/9/20 at 84.) She testified that she met with Gallegos  
3 and talked about his ATV accidents. (*Id.*) He reported injuring his knee and his head, but  
4 did not indicate that he experienced any symptomology from the head injury. (*Id.* at 84–  
5 85.) Gallegos’s family did not tell Nowatzki that he suffered head injuries from the ATV  
6 accidents, but she believed there was a possibility he did have traumatic brain injury. (*Id.*  
7 at 87.) She faxed the information she had gathered to Antieau in August 1994. (*Id.* at 85.)  
8 She did not include any recommendations or directions to Antieau as to what he should do  
9 with the witnesses, as that was not her role. (*Id.* at 86.) Attorney Fisher, however, did  
10 discuss with Antieau the possibility of having Gallegos evaluated for brain injury. (*Id.*)

11 ***k. Sally Ake***

12 Ake was one of Gallegos’s special education teachers in high school. She did not  
13 testify during the state court proceedings. She provided declarations in 2002 and 2020. In  
14 her 2020 declaration (Pet’s Ex. 5), she states that Gallegos “suffered from significant  
15 cognitive limitations and learning disabilities” but “was not a behavioral problem” in her  
16 classes. (*Id.*, ¶ 6.) Gallegos was ashamed of his cognitive disabilities, which impeded his  
17 ability to relate socially with other students. (*Id.*, ¶ 7.) He showed signs of depression and  
18 began to self-medicate with alcohol and drugs. (*Id.*) Ake states that learning disabilities  
19 like Gallegos’s have “pervasive and life-long effects both inside and outside the  
20 classroom.” (*Id.*, ¶ 8.) Teenagers with learning disabilities have difficulty with decision-  
21 making, impulse control, and processing information; they are often followers rather than  
22 leaders. (*Id.*, ¶ 9.) Gallegos’s “most serious impairments were caused by deficits in the  
23 ability of his brain to process auditory and visual information”; these deficits “impact[]  
24 both academic and social learning.” (*Id.*, ¶ 11.) Due to his cognitive deficits and lack of  
25 adaptive skills, when Gallegos left school he “he did not possess the cognitive, social or  
26 the practical judgment of an 18-year-old.” (*Id.*, ¶ 18.) Ake wrote a short letter to trial  
27 counsel prior to Gallegos’s 1991 sentencing in which she described Gallegos as a follower.  
28 (*Id.*, ¶ 20.) She was not contacted by resentencing counsel. (*Id.*)

1 At the evidentiary hearing, Ake testified that she taught Gallegos in tenth and  
2 eleventh grade. (RT 11/9/20 at 98.) He progressed in some areas and regressed in others.  
3 (*Id.*) While his cognitive abilities were always an issue, she did not notice a significant  
4 decline in that area. (*Id.* at 99.)

5 ***1. Noah Stalvey***

6 Stalvey was Gallegos's juvenile probation officer. He testified at the 1991  
7 sentencing and provided a declaration in 2020. In his declaration (Pet's Ex. 17), Stalvey  
8 states that Gallegos was "very likeable," "personable and agreeable." (*Id.*, ¶ 3.) He  
9 explains that in his job he "encountered many evil kids," but "never consider[ed] Michael  
10 to be one of them." (*Id.*, ¶ 4.) He believed Gallegos did not have the cognitive ability to  
11 succeed on probation. (*Id.*, ¶ 5.) Gallegos did not "have the ability to think before he  
12 acted"; he behaved impulsively and became "involved in a situation without considering  
13 the consequences." (*Id.*) Stalvey states that he had special training and experience working  
14 with juvenile sexual offenders and found that Gallegos did not fit that profile. (*Id.*, ¶ 6.)  
15 Before testifying at the 1991 sentencing, Stalvey spoke with defense counsel, who did not  
16 ask him any questions about Gallegos's learning disability. (*Id.*, ¶ 9.) Stalvey was not  
17 contacted by resentencing counsel. (*Id.*, ¶ 7.)

18 At the evidentiary hearing on remand, Stalvey testified that Gallegos continued to  
19 have substance abuse issues throughout his probation, and that five years of intervention  
20 did not make much of a difference. (RT 11/9/20 at 105.) He testified that he received no  
21 information from Gallegos or his family members about Gallegos being involved in ATV  
22 accidents or suffering head injuries. (*Id.* at 106.) During his supervision of Gallegos,  
23 Stalvey noticed no appreciable decline in his cognitive abilities. (*Id.* at 107.)

24 **2. Gallegos's experts**

25 ***a. Dr. Cowardin***

26 Habeas counsel retained Dr. Nancy Cowardin to conduct psycho-educational  
27 testing. In her report, dated May 28, 2002, Dr. Cowardin found that Gallegos's "academic  
28 age equivalent falls at approximately the 10½ year level, his language fundamentals at age

1 8, and overall information processing is estimated just below age 10 years, with lapses to  
2 the 6 year level in specific auditory tasks.” (Pet’s Ex. 33 at 19.) She opined that “it is  
3 reasonable to conclude that at the time this crime was committed, Michael operated  
4 cognitively in much the same manner as a far younger child. . . . At 18, the youth did not  
5 function in the least like a competent adult defendant.” (*Id.* at 6, 20.) Dr. Cowardin  
6 measured Gallegos’s IQ as 98. (*Id.* at 9.)

7 Dr. Cowardin discussed the impact of learning and attentional disorders, explaining  
8 that “when a child like Michael has additional difficulties involving emotional, attention,  
9 and language processing issues, LD (learning disability) can present an insurmountable  
10 hurdle with lifelong effects.” (*Id.* at 4.)

11 Dr. Cowardin opined that individuals with such deficits “are often at a loss in  
12 making appropriate adaptive decisions on confrontation, and can be easily manipulated. . . .  
13 It was therefore not a surprise to learn that [Gallegos] neither preplanned nor initiated the  
14 crime on his own, but followed the direction of another who he perceived as more  
15 competent.” (*Id.* at 20–21.)

16 Dr. Cowardin, who has since retired, did not testify at the evidentiary hearing.

17 ***b. Dr. Heilbronner***

18 Dr. Heilbronner, a neuropsychologist, conducted a complete neuropsychological  
19 evaluation of Gallegos and prepared a report dated December 12, 2011. (Pet’s Ex. 28.) He  
20 reviewed evaluations by other experts, interviewed Gallegos, and administered a battery of  
21 neuropsychological tests. (*Id.* at 3–4.)

22 In his report and in an addendum dated October 3, 2017, Dr. Heilbronner recounted  
23 three ATV accidents Gallegos reportedly was involved in between the ages of 15 and 17.  
24 (Pet’s Ex. 29 at 1.) In the first incident, Gallegos had been drinking when he tried to jump  
25 over a flower bed but fell backwards and hit his head on a concrete block. (*Id.*) He reported  
26 that he had no memory of the rest of the night, but later learned that he had been driving  
27 an ATV; when he woke up on the living room floor the next day the back of his shirt was  
28 bloody. (*Id.*) In the second incident, he hit a tree while driving an ATV. (*Id.*) Afterwards



1 he was “out for a while.” (*Id.*) The helmet he was wearing broke apart in six pieces. (*Id.*)  
2 In the third incident Gallegos was drinking at a party when he got on the back of a stranger’s  
3 ATV. (*Id.*) The vehicle hit a tree. (*Id.*) Gallegos “reportedly hit his head on the back of  
4 the driver’s helmet before falling off the [ATV] and landing on rocks.” (*Id.*)

5 In his report Dr. Heilbronner focused on the reported periods of unconsciousness  
6 following each incident and Gallegos’s “post-traumatic amnesia” following two of the  
7 incidents. (*Id.*) Dr. Heilbronner opined that in each accident Gallegos suffered “not mere  
8 concussions,” but “moderate to severe trauma to the brain.” (*Id.*) According to Dr.  
9 Heilbronner, traumatic brain injuries affect adolescents’ brains more severely than the  
10 brains of adults, and “the greatest challenges many adolescents with brain damage face are  
11 changes in their abilities to think and learn and to develop socially appropriate behaviors.”  
12 (*Id.* at 2.)

13 Dr. Heilbronner measured Gallegos’s IQ as 79, or borderline to low average. (Pet’s  
14 Ex. 28 at 5.) His neuropsychological testing detected impaired cognitive functions in  
15 several areas, including attention, concentration, working memory, mental flexibility, and  
16 response inhibition. The tests thus revealed “objective evidence of cognitive dysfunction  
17 reflecting brain-based disturbances in functioning.” (*Id.* at 5, 7.) Dr. Heilbronner  
18 diagnosed Gallegos with Cognitive Disorder, NOS, which is a disorder “characterized by  
19 cognitive dysfunction presumed to be due to the direct physiological effect of a general  
20 medical condition that do not meet criteria for any of the specific deliriums, dementias, or  
21 amnestic disorders. . . .” (*Id.* at 7.) He explained that “the cognitive deficits cannot be  
22 explained by other factors such as normal aging, psychological/emotional issues (e.g.,  
23 depression, anxiety), or any other type of current environmental stressors.” (*Id.*)

24 Dr. Heilbronner opined that Gallegos’s “brain damage played a role in the  
25 commission of the offense through a lack of planning and organization (e.g., premeditation)  
26 and an impaired ability to consider the consequences of his actions.” (*Id.*) Combined with  
27 “the cognitive and psychosocial effects of a learning disability, this compromised his  
28 capacity to inhibit and/or control his behavior at the time of the offense and also made him



1 susceptible to the influence of others.” (*Id.*)

2 According to Dr. Heilbronner, Gallegos may have been even more impaired in 1990  
3 when the crimes were committed because his “brain was even less developed, given his  
4 age and the associated lack of neural maturation that is evident in the brains of adolescents,  
5 especially those with learning disabilities and in those who have sustained brain damage  
6 as a result of multiple head injuries.” (Pet’s Ex. 29 at 3.)

7 Dr. Heilbronner opined that with proper testing Gallegos’s “widespread brain  
8 dysfunction” could have been detected at the time of resentencing in 1994. (*Id.* at 4.)

9 At the evidentiary hearing, Dr. Heilbronner testified that the battery of  
10 neuropsychological tests he administered included measures to detect malingering. (RT  
11 11/9/20 at 123.) Gallegos’s efforts were within normal limits, so the results of the tests  
12 were valid. (*Id.* at 124.)

13 Dr. Heilbronner did not include all of the test scores in his 2011 report. (*Id.* at 127.)  
14 He also destroyed the raw data, pursuant to a policy which allows the destruction of such  
15 data after seven years. (*Id.* at 127–28.)

16 Dr. Heilbronner testified that Gallegos’s low IQ score in comparison with previous  
17 scores was attributable to the new, more complete, test he administered. (*Id.* at 126–27.)  
18 The lower score also could have resulted from Gallegos’s substance abuse or head injuries.  
19 (*Id.* at 127.)

20 Dr. Heilbronner testified that he found “objective evidence of cognitive dysfunction  
21 reflecting brain-based disturbances in functioning” and that he diagnosed Gallegos with  
22 Cognitive Disorder NOS, an “acquired physiological condition,” pursuant to the DSM-  
23 IV.<sup>10</sup> (*Id.* at 134–35.) According to Dr. Heilbronner, Gallegos’s brain dysfunction  
24 exceeded what could be attributed to his learning disability alone. (*Id.* at 137–38.) Dr.  
25 Heilbronner could not specify the cause of the dysfunction; there were multiple causes.  
26

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27 <sup>10</sup> Diagnostic and Statistical Manual IV, which was replaced by DSM-V in 2013. (RT  
28 11/9/20 at 135–36.) In DSM-V, the diagnosis Cognitive Disorder NOS was replaced by  
Mild Neurocognitive Disorder. (*Id.* at 136.)

1 (*Id.* at 138.) He explained that “the neuropsychologist . . . needs to come up with a reason  
2 why the results were like they were, and the reason I gave NOS is because I couldn’t say  
3 specifically it’s due just to the head trauma or due just to the alcohol.” (*Id.*) Gallegos’s  
4 “disturbances and abnormalities in brain function exist without regard to the specific cause  
5 or causes of his impaired brain.” (*Id.*)

6 According to Dr. Heilbronner, none of the previous testing done on Gallegos,  
7 including the evaluations of Drs. DiBacco and Cowardin, would have revealed the extent  
8 of Gallegos’s brain injury or impairment. (*Id.*) He discussed Dr. Cowardin’s diagnosis of  
9 specific learning disability, explaining that SLD is “a neurodevelopmental disorder,” which  
10 means that “something is wrong with the central nervous system.” (*Id.* at 141.) Dr.  
11 Heilbronner testified that “the information processing disorder and the related deficits”  
12 associated with SLD are “the result[] of an organic damage or impairment to the normal  
13 functioning of the brain.” (*Id.*)

14 Dr. Heilbronner testified that Gallegos’s head injuries worsened the damage to his  
15 brain attributable to SLD. (*Id.* at 142.) He opined that the reported facts surrounding the  
16 accidents, including loss of consciousness and amnesia, made it plausible that Gallegos  
17 suffered TBI. (*Id.* at 143–45.) According to Dr. Heilbronner, contemporaneous medical  
18 records are not required to render a diagnosis of TBI. (*Id.* at 149.)

19 Dr. Heilbronner stated that even if Gallegos did not suffer any head or brain injury  
20 from the ATV accidents, “he still suffer[s] from organic brain abnormalities evident in  
21 school testing, Dr. Cowardin’s testing and [Dr. Heilbronner’s] testing.” (*Id.* at 150.) Even  
22 in the absence of TBI, the deficits identified in Dr. Heilbronner’s testing are “the result of  
23 organic brain damage or impairment.” (*Id.*)

24 Dr. Heilbronner testified that the repeated head traumas had an “exponential effect”  
25 on Gallegos’s brain. (*Id.* at 146.) Gallegos’s youth and pre-existing learning disability  
26 also made him more vulnerable to TBI. (*Id.* at 148–49.)

27 Dr. Heilbronner testified that depression and personality change often follow TBI,  
28 and that Gallegos’s teachers described him as being depressed around the time the

1 accidents occurred. (*Id.* at 147–48.)

2 According to Dr. Heilbronner, at the time of the crime, Gallegos’s brain injuries  
3 significantly impaired his capacity to conform his conduct to the requirements of law and  
4 compromised his ability to control his impulses. (*Id.* at 151.) The injuries affected his  
5 ability to plan, reason, and think through the consequences of his actions; they also left him  
6 gullible, easily manipulated, and impulsive. (*Id.* at 151–53.)

7 On cross-examination, Dr. Heilbronner acknowledged that all of his testimony in  
8 capital cases has been on the side of the defendant, and he has given approximately 20  
9 presentations to criminal defense organizations. (*Id.* at 155–58.)

10 Dr. Heilbronner agreed that neuropsychology is an evolving field and the state of  
11 the field today is much different than it was in 1994. (*Id.* at 159.)

12 Dr. Heilbronner acknowledged that Gallegos’s reported memory gaps could be the  
13 result of alcohol abuse. (*Id.* at 176–77.) He agreed that a layperson’s description of  
14 Gallegos as “pale” or “dazed” is not dispositive of head injury and the described symptoms  
15 could be the result of other causes. (*Id.* at 177–78.)

16 Dr. Heilbronner testified that he did not order follow-up brain scans, and in fact no  
17 scans were ever performed. (*Id.* at 183–84.) He stated that neuropsychological testing can  
18 be more sensitive to brain damage than scans, but admitted it was possible that a scan could  
19 show damage. (*Id.* at 184; *see id.* at 199.)

20 Dr. Heilbronner acknowledged that some of the tests he performed were not  
21 available at the time of Gallegos’s resentencing. (*Id.* at 184.) However, neuro-cognitive  
22 deficits, such as attention, memory, and executive functions, could have been “reliably  
23 assessed” in 1994. (*Id.*)

24 Dr. Heilbronner testified that Gallegos’s depression might have been a sequela of  
25 his head trauma, but acknowledged that it could also have been situational. (*Id.* at 185.)  
26 He conceded that some of the effects he attributed to Gallegos’s brain injury are also  
27 consistent with both intoxication and the long-term effects of drug or alcohol abuse. (*Id.*  
28 at 188.)

1 Finally, Dr. Heilbronner agreed it was plausible that Gallegos's conduct in carrying  
2 out the crime could be explained even in the absence of TBI by Gallegos's pre-existing  
3 learning disability and emotional problems. (*Id.* at 198.)

4 *c. Dr. David Fassler*

5 Gallegos has presented an affidavit from Dr. David Fassler, a child and adolescent  
6 psychiatrist. (Pet's Ex. 31.) In the affidavit, dated October 6, 2017, Dr. Fassler explained  
7 that the region of the brain "responsible for instinctual behavior, such as aggression, anger,  
8 pleasure and fear," develops first, while the frontal cortex, the region "responsible for  
9 planning, strategizing, and judgment," develops last and continues to mature into the mid-  
10 20s. (*Id.*, ¶¶ 12, 13.) Before the frontal cortex is fully developed, "young adults [are] more  
11 likely to act on instinct or impulse," and it is "harder for them to modulate emotional  
12 responses, regulate behavior, control impulses, assess risks or fully consider the  
13 consequences of their actions." (*Id.*, ¶ 15.)

14 Brain development can be impaired by substance abuse. (*Id.*, ¶¶ 17–21.)  
15 Adolescents are more susceptible to long-lasting impacts of alcohol than adults, and  
16 alcohol use in adolescents "may result in alterations in normal brain development leading  
17 to permanent brain damage." (*Id.*, ¶¶ 19, 21.) Dr. Fassler also noted that "Gallegos has a  
18 genetic disposition to substance abuse." (*Id.*, ¶ 55.)

19 According to Dr. Fassler, at the time of the crime, Gallegos's brain "would still have  
20 been in the process of achieving a full level of adult development, with the frontal lobes,  
21 which control judgment and reasoning, developing last." (*Id.*, ¶ 60.) Gallegos also had a  
22 history of drug and alcohol use and head injuries, which can "interfere with the process of  
23 normal brain development." (*Id.*, ¶¶ 61, 64.)

24 At the evidentiary hearing, Dr. Fassler first testified that learning disability is  
25 indicative of "some level of brain dysfunction," a fact that was "well understood" in 1994.  
26 (RT 11/9/20 at 207.)

27 Dr. Fassler then testified that he had reviewed Gallegos's records to determine  
28 whether he had a genetic predisposition for substance abuse. (*Id.*) He concluded that

1 Gallegos did have such a predisposition based on his family history of alcohol abuse, with  
2 his father, brother, paternal grandfather, and paternal aunt all having problems with  
3 alcohol. (*Id.* at 209.) Dr. Fassler testified that individuals with such a predisposition are  
4 three to four times more likely to have a substance abuse problem. (*Id.* at 208.) Other  
5 factors contributing to a predisposition to alcohol abuse were present in Gallegos's case,  
6 including environmental factors, such as being provided alcohol by his older brother, and  
7 the young age, 13, at which Gallegos began drinking. (*Id.* at 209–10.) The factors have a  
8 “compounding” effect. (*Id.* at 210.) With these factors in place, Gallegos's use of alcohol  
9 before the crime was not “purely voluntary.” (*Id.* at 211.)

10 Dr. Fassler next testified about the effects of alcohol abuse on brain development.  
11 He explained that alcohol, if abused, is a neurotoxin that can cause “organic damage” or  
12 “physical damage” by “interfer[ing] with the connections between brain cells.” (*Id.* at  
13 212.) Such damage can be permanent. (*Id.* at 212–13.) The damage can appear in  
14 neuropsychological testing. (*Id.* at 212.)

15 Alcohol abuse in adolescents affects the still-developing frontal lobe, which is  
16 responsible for executive functioning. (*Id.* at 213–14.) This information was available in  
17 1994. (*Id.* at 212, 215.)

18 The results of such damage include difficulties in reasoning, impulse control,  
19 stopping an action once started, and susceptibility to the influence of others. (*Id.* at 214–  
20 15.) Gallegos's behavior exhibited these characteristics. (*Id.* at 215.)

21 Dr. Fassler acknowledged that some of the effects of brain impairment, such as  
22 difficulty with impulse control, judgment, and reasoning, could also be caused by being  
23 under the influence of alcohol or drugs. (RT 11/10/20 at 225.)

24 Dr. Fassler testified that taken together, learning disability, substance abuse, and  
25 head injuries have a cumulative effect on the brain. (*Id.* at 226.) When all three are present  
26 it is not possible to assign a percentage to each cause. (*Id.*)

27 **d. Dr. Daniel Reschly**  
28

1 Habeas counsel retained Dr. Daniel Reschly to replace the retired Dr. Cowardin.  
2 Dr. Reschly, a psychologist with expertise in learning disabilities and special education,  
3 prepared a declaration dated September 11, 2020. (Pet's Ex. 37.) Dr. Reschly diagnosed  
4 Gallegos with Specific Learning Disability (SLD) and Attention-Deficit Hyperactivity  
5 Disorder (ADHD).

6 Dr. Reschly also opined that Gallegos has "brain-based neurodevelopmental  
7 disabilities that result in diminished capacities" in areas of reasoning, judgment,  
8 understanding and processing information, communicating, learning from experience, and  
9 controlling impulses. (*Id.*, ¶ 117.) According to Dr. Reschly, "Gallegos's neurocognitive  
10 deficits and diminished capacities are inseparable from his conduct at the time of the  
11 offense." (*Id.*)

12 Dr. Reschly explained that "SLD is a developmental challenge that has effects on  
13 academic learning *and* social development" and "life-long effects on individual adjustment  
14 and performance." (*Id.*, ¶ 121.)

15 Dr. Reschly stated that "ADHD is a developmental challenge that has significant  
16 effects on social and academic development." (*Id.*) Impulsivity and inattention are  
17 frequently associated with SLD and ADHD, and individuals with ADHD often have  
18 inadequate control over their emotions. (*Id.*, ¶ 122.) Dr. Reschly opined that: "The  
19 combined effects of SLD and ADHD likely were significant contributors to Mr. Gallegos  
20 [sic] poor judgment and inadequate impulse control apparent in the crimes." (*Id.*, ¶ 123.)

21 According to Dr. Reschly, the effects of TBI on Gallegos's behavior include "poor  
22 judgment, impulsivity, failure to consider consequences, failure to inhibit inappropriate  
23 impulses, poor decision making, inability to delay gratification, and poor reasoning and  
24 judgment." (*Id.*, ¶ 124.) These effects, exacerbated by alcohol abuse, likely influenced  
25 Gallegos's behavior at the time of the crimes. (*Id.*)

26 At the evidentiary hearing, Dr. Reschly testified that SLD is a "brain-based  
27 neurobiological disorder." (RT 11/10/09 at 239.) It is caused by brain dysfunction "related  
28 to largely unknown factors," although there is a genetic component. (*Id.*) SLD is a life-

1 long condition that affects not only the learning of academic information but also  
2 “emotional regulation in social learning.” (*Id.*)

3 Dr. Reschly testified that ADHD is also the result of “brain dysfunction.” (*Id.* at  
4 241.) It is associated with “identifiable structural differences” in the brain. (*Id.*) Both  
5 SLD and ADHD were well understood as far back as the 1980s. (*Id.* at 242.)

6 A person with both SLD and ADHD will suffer from learning difficulties as well as  
7 problems with attention, motivation, and impulse control. (*Id.*)

8 Dr. Reschly explained that Gallegos’s low score on the IQ test administered by Dr.  
9 Heilbronner was the result of poor performance on subscales not included in prior versions  
10 of the test. (*Id.* at 253.)

11 Dr. Reschly testified that SLD affects frontal lobe development and therefore  
12 impairs the ability to reason and control impulses. (*Id.* at 256.) It is the brain’s “brake  
13 pedal,” meaning that it “assist[s] people in considering the consequence and interactions  
14 of not simply impulsively doing something.” (*Id.* at 257.) The frontal lobe does not reach  
15 maturity until a person is in his late teens or early twenties. (*Id.*) A person with  
16 underdeveloped executive functioning has deficits in “inhibition and impulse control” and  
17 the “ability to delay gratification.” (*Id.* at 258.) The relationship between the frontal lobe  
18 and SLD was understood in 1994. (*Id.*)

19 Dr. Reschly testified that the deficits associated with Gallegos’s underdeveloped  
20 executive functioning were apparent during his school years and around the time of the  
21 murder. (*Id.*) In committing the crime, Gallegos exhibited deficits in judgment, reasoning,  
22 ability to delay gratification, impulse control, and decision-making. (*Id.* at 259.)

23 Dr. Reschly testified that SLD affects social and adaptive behaviors. (*Id.* at 259–  
24 60.) He testified that Gallegos’s deficits in auditory processing impact his ability to follow  
25 directions, stay on task, and learn from mistakes. (*Id.* at 260.) A person with such deficits  
26 is susceptible to manipulation by others. (*Id.* at 261.)

27 **2. Respondents’ expert witness**

28 ***Dr. Corwin Boake***



1 Respondents retained one expert, Dr. Corwin Boake, a neuropsychologist. Dr.  
2 Boake interviewed Gallegos by video-teleconference but, due to restrictions on visitation  
3 caused by the COVID-19 pandemic, was unable to administer any testing. (Resp's Ex.  
4 59.) Dr. Boake also reviewed previous evaluations, including the testing performed by Dr.  
5 Heilbronner.

6 In his report, Dr. Boake opined that there is no objective evidence that Gallegos  
7 experienced concussions or TBI. (*Id.* at 7.) He explained that the criteria for  
8 neurocognitive disorder due to TBI requires that altered mental status and other neurologic  
9 signs must be observed immediately following the injury. (*Id.*) Delayed, self-reported  
10 symptoms, as in Gallegos's case, do not meet those criteria. (*Id.*)

11 Dr. Boake opined that, given Gallegos's history of alcohol abuse and binge drinking,  
12 it is most likely that his reported memory gaps were alcohol blackouts, not concussions or  
13 TBI. According to Dr. Boake: "It is unclear how the reported memory gaps can be  
14 attributed to undiagnosed brain injuries instead of alcohol use." (*Id.* at 8.)

15 Dr. Boake found that Dr. Heilbronner's diagnosis of neurocognitive impairment  
16 caused by TBI was unreliable based on "three methodological problems." (*Id.*) First, there  
17 were no medical records so the history taken by Dr. Heilbronner relied on Gallegos's self-  
18 report, and "[r]elying on the history as reported by a person with no medical training, and  
19 who was probably intoxicated at the time of the relevant events, increases the risk of  
20 diagnostic errors." (*Id.*) According to Dr. Boake, there is no "validated procedure to  
21 diagnose traumatic brain injury using only neuropsychological assessment" and it is not  
22 possible to use "neuropsychological testing to detect remote concussions in a person with  
23 learning disability and substance abuse." (*Id.*) Second, Dr. Heilbronner failed to consider  
24 alcohol blackouts as a possible cause of Gallegos's reported memory gaps. (*Id.*) Third,  
25 Dr. Heilbronner failed to consider whether the decline in Gallegos's IQ scores from the  
26 mid-90s to 79 could be the result of invalid performance, given that "there is no medical  
27 reason" for the decline. (*Id.*) Dr. Boake concluded that he had "never seen a  
28 neuropsychological report offer a diagnosis of moderate to severe traumatic brain injury

1 based only on the neuropsychological evaluation results.” (*Id.* at 9.)

2 The diagnoses most consistent with Dr. Boake’s findings are specific learning  
3 disorder, adjustment disorder, and polysubstance use disorder. (*Id.*)

4 Dr. Boake noted that “Dr. Heilbronner’s report does not list the majority of test  
5 scores.” (*Id.*) If the data had been available, Dr. Boake “would have used them to check  
6 test scoring, to compare the test data to previous examinations, to compare the test data to  
7 relevant research, and to compare [his] interpretations of the test data to those of Dr.  
8 Heilbronner.” (*Id.*)

9 At the evidentiary hearing on remand, Dr. Boake testified that most cases of TBI  
10 are diagnosed without a neuropsychologist. (RT 11/10/20 at 290.) A neuropsychological  
11 examination alone is not sufficient to diagnose TBI. (*Id.* at 289.) Instead, the diagnosis is  
12 made by a physician who performs a neurological examination, which includes imaging  
13 studies. (*Id.* at 290.)

14 Dr. Boake testified that evaluating the lower IQ score measured by Dr. Heilbronner  
15 would require access to validity data that are not available. (*Id.* at 298.) Therefore, there  
16 is no objective evidence that Gallegos put forth his best effort on the test. (*Id.* at 299.)

17 Dr. Boake testified to a reasonable degree of neuropsychological certainty there was  
18 no objective evidence of concussion or TBI. (*Id.* at 306.) Such evidence would include a  
19 scan or medical observation. (*Id.*) There were no medical records documenting Gallegos’s  
20 reported head injuries. (*Id.*) Dr. Boake testified that under the DSM-V, a diagnosis of TBI  
21 requires medical observation of neurocognitive effects immediately following the injury;  
22 delayed, self-reported observations are not sufficient. (*Id.* at 308.)

23 Dr. Boake noted that Gallegos admitted to binge drinking and was intoxicated at the  
24 time of each of the ATV accidents he reported to Dr. Heilbronner. (*Id.* at 310.)  
25 Accordingly, Gallegos’s reported gaps in memory are best explained as alcoholic  
26 blackouts. (*Id.*) A finding of TBI is unnecessary to diagnose Gallegos’s condition. (*Id.*)

27 Dr. Boake reiterated that Dr. Heilbronner used non-standard methods in reaching  
28 his diagnosis of neurocognitive disorder due to brain damage and moderate to severe TBI.

1 (*Id.* at 312.) He repeated that moderate to severe TBI is never diagnosed based solely on a  
2 neuropsychological evaluation without additional medical evidence. (*Id.*) Dr. Boake again  
3 challenged Dr. Heilbronner's failure to consider alcoholic blackouts in reaching his  
4 diagnoses and his failure to adequately explain the decline in Gallegos's IQ score. (*Id.* at  
5 313.)

6 Dr. Boake testified that he diagnosed Gallegos with SLD, substance abuse, and  
7 adjustment disorder. (*Id.* at 320.)

## 8 **VI. FINDINGS OF FACT**

9 1. Gallegos has a specific learning disability. (*See* Doc. 227 at 3.)

10 2. SLD is a "brain-based neurobiological disorder." (Reschly, RT 11/10/09 at 239.)  
11 It is caused by brain dysfunction related to largely unknown factors. (*Id.*) SLD is a life-  
12 long condition that affects both the learning of academic information and "emotional  
13 regulation in social learning." (*Id.*)

14 3. A learning disability is indicative of "some level of brain dysfunction," a fact that  
15 was "well understood" in 1994. (Fassler, *id.* at 207.) SLD is "a neurodevelopmental  
16 disorder," which means that "something is wrong with the central nervous system."  
17 (Heilbronner, *id.* at 141.) "[T]he information processing disorder and the related deficits"  
18 associated with SLD are "the result[] of an organic damage or impairment to the normal  
19 functioning of the brain." (*Id.*)

20 4. SLD affects frontal lobe development and therefore the ability to reason and control  
21 impulses. (Reschly, RT 11/10/20 at 256.) The frontal lobe does not reach maturity until a  
22 person is in his late teens or early twenties. (*Id.* at 257.) SLD affects social and adaptive  
23 behaviors. (*Id.* at 259.) SLD impacts the ability to follow directions, stay on task, and  
24 learn from mistakes. (*Id.* at 260.) A person with such deficits is susceptible to  
25 manipulation. (*Id.* at 261.)

26 5. Gallegos has Attention-Deficit Hyperactivity Disorder. (*Id.* at 240.)

27 6. ADHD is the result of brain dysfunction. (*Id.* at 241.) It is associated with  
28 "identifiable structural differences" in the brain. (*Id.*)

1 7. A person with both SLD and ADHD suffers from learning difficulties as well as  
2 problems with attention, motivation, impulse control, and the ability to delay gratification.  
3 (*Id* at 258.)

4 8. Both SLD and ADHD were well understood as far back as the 1980s. (*Id* at 242.)

5 9. Gallegos had a history of substance abuse. (*See* Doc. 227 at 3.)

6 10. Gallegos was genetically predisposed to substance abuse. (Fassler, RT 11/9/20 at  
7 209.) That predisposition was compounded by environmental factors and the young age at  
8 which he started drinking. (*Id.* at 209–10.)

9 11. Alcohol, when abused, is a neurotoxin that can cause “organic brain damage.” (*Id.*  
10 at 212.) Such damage can be permanent. (*Id.* at 212–13.) The damage can appear in  
11 neuropsychological testing. (*Id.* at 212.) Alcohol abuse in adolescents affects the still-  
12 developing frontal lobe, which is responsible for executive functioning. (*Id.* at 213–14.)

13 12. The results of brain damage from alcohol abuse include difficulties in reasoning,  
14 impulse control, stopping an action once started, and susceptibility to the influence of  
15 others. (*Id.* at 214–15.) This information was available in 1994. (*Id.* at 212, 215.)

16 13. Resentencing counsel Antieau was aware that Gallegos suffered from a learning  
17 disability and had a history of substance abuse.

18 14. Gallegos was involved in ATV accidents. (*See* Doc. 217 at 3.) In one accident he  
19 was the passenger on an ATV that crashed into a tree. (*See* Pet’s Ex. 2 at 411–12, 628,  
20 669–70, 705–06.) In another accident, Gallegos crashed an ATV into the side of a truck.  
21 (Pet’s Ex. 9, ¶ 6; Pet’s Ex. 11, ¶ 6.) Gallegos, Jerry Gallegos Jr., and Tony Duran described  
22 additional ATV accidents. (Pet’s Ex. 2 at 410, 705; Pet’s Ex. 11, ¶¶ 5, 7; Pet’s Ex’s. 28 at  
23 4, 29 at 1.)

24 15. It is probable that Gallegos suffered TBI in one or more of these accidents. (*See*  
25 Pet’s Ex’s 28 at 4, 29 at 4; Heilbronner, RT 11/9/20 at 146–48.)

26 16. Dr. Heilbronner performed a full battery of neuropsychological tests. The test  
27 results were valid. (RT 11/09/20 at 123–24.)  
28

1 17. It is probable, based on the results of that testing, that Gallegos suffers from  
2 Cognitive Disorder NOS (DSM-IV). (Pet's Ex's. 28 at 7, 29 at 4; Heilbronner, RT  
3 11/09/20 at 136–38.)

4 18. The adolescent brain is more susceptible to the effects of TBI. (Pet's Ex. 29 at 2;  
5 Heilbronner, RT 11/09/10 at 158–49.) Pre-existing conditions such as SLD increase  
6 vulnerability to the effects of brain trauma. (RT 11/09/20 at 149.)

7 19. In individuals with brain injury, impulsivity is increased, judgment and reasoning  
8 are compromised, and “in many cases the person acts much younger than their  
9 chronological age.” (*Id.* at 151.) A person with such injuries is also susceptible to  
10 manipulation. (*Id.*)

11 20. Gallegos's conduct in committing the offenses, including poor judgment,  
12 impulsivity, immaturity, inability to stop an action once started, and susceptibility to be  
13 being manipulated by others, was consistent with the effects caused by SLD and brain  
14 damage resulting from alcohol abuse or TBI. (*See* Fassler, RT 11/09/20 at 215.)

15 21. The etiology of Gallegos's brain dysfunction cannot be known for certain, but it is  
16 probable that the effects of substance abuse and TBI contributed to the condition. (*Id.* at  
17 138.) Gallegos's brain dysfunction exists without respect to a specific cause or causes.  
18 (*Id.*) Even in the absence of TBI, Gallegos's deficits are “the result of organic brain damage  
19 or impairment.” (*Id.* at 150.)

20 22. Neuropsychological testing available in 1994 could have identified Gallegos's  
21 cognitive deficits. (*Id.* at 184.)

22 23. Resentencing counsel Antieau possessed information that Gallegos was involved in  
23 at least one ATV accident. Gallegos reported that the ATV was traveling at 50 mph when  
24 it crashed into a tree. (Pet's Ex. 2 at 411.) He was not wearing a helmet. (*Id.*) He landed  
25 face-first in a pile of rocks and “hurt his head.” (*Id.*) According to witnesses who saw him  
26 after the accident, he appeared “dazed,” “pale,” and “in shock.” (*Id.* at 670, 706.) The  
27 accident was serious enough to leave the driver paralyzed. (*Id.* at 411, 670, 705.)  
28

24. Antieau did not pursue the information that Gallegos had been injured in ATV accidents and possibly suffered head injuries. (Pet’s Ex. 8, ¶¶ 10, 11.)

25. At the resentencing hearing, Antieau did not present evidence of Gallegos’s ATV accidents or possible head injuries. He did not present expert testimony about the brain-based nature of SLD or the effects of substance abuse on the brain.

## II. CONCLUSIONS OF LAW

### 1. Resentencing counsel Antieau’s performance was deficient

By failing to investigate and present evidence of organic brain damage at Gallegos’s 1994 resentencing, Antieau’s performance fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688.

Under prevailing professional norms at the time of Gallegos resentencing, Antieau had an “obligation to conduct a thorough investigation of the defendant’s background.” *Porter v. McCollum*, 558 U.S. 30, 39 (2009) (quoting *Williams v. Taylor*, 529 U.S. 362, 396 (2000)). “It is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase.” *Caro v. Calderon*, 165 F.3d 1223, 1227 (9th Cir. 1999). “[C]ounsel’s duty to investigate all potentially mitigating evidence . . . and to provide the sentencing court with a full presentation of the evidence that might lead the sentencer to spare his client’s life is not discharged merely by conducting a limited investigation . . . or by providing the sentencing court with a cursory or ‘abbreviated’ presentation of potentially mitigating factors.” *Lambright v. Schriro*, 490 F.3d 1103, 1120–21 (9th Cir. 2007) (quoting *Stankewitz v. Woodford*, 365 F.3d 706, 716 (9th Cir. 2004)); *see also Wiggins*, 539 U.S. at 524 (finding ineffective assistance where “counsel abandoned their investigation of petitioner’s background after having acquired only rudimentary knowledge of his history from a narrow set of sources”).

“Where counsel is aware of potentially mitigating evidence, he or she must investigate that evidence, absent a reasonable strategic reason not to do so.” *Bemore v. Chappell*, 788 F.3d 1151, 1171 (9th Cir. 2015); *see Wiggins*, 539 U.S. at 521; *Andrus v. Texas*, 140 S. Ct. 1875, 1883 (2020) (finding deficient performance where “counsel

1 disregarded, rather than explored, the multiple red flags” concerning defendant’s mental  
2 health).

3 The Ninth Circuit has “repeatedly held that counsel may render ineffective  
4 assistance if he ‘is on notice that his client may be mentally impaired,’ yet fails ‘to  
5 investigate his client’s mental condition as a mitigating factor in a penalty phase hearing.’”  
6 *Caro v. Woodford*, 280 F.3d 1247, 1254 (9th Cir. 2002) (quoting *Hendricks v. Calderon*,  
7 70 F.3d 1032, 1043 (9th Cir. 1995)). “[W]hen ‘tantalizing indications in the record’  
8 suggest that certain mitigating evidence may be available, those leads must be pursued.”  
9 *Lambright*, 490 F.3d at 1117 (quoting *Stankewitz*, 365 F.3d at 719–20).

10 “In assessing the reasonableness of an attorney’s investigation, . . . a court must  
11 consider not only the quantum of evidence already known to counsel, but also whether the  
12 known evidence would lead a reasonable attorney to investigate further.” *Wiggins*, 539  
13 U.S. at 527; *see Earp v. Ornoski*, 431 F.3d 1158, 1175–76 (9th Cir. 2005) (“[T]he presence  
14 of certain elements in a capital defendant’s background, such as a family history of  
15 alcoholism, abuse, and emotional problems, triggers a duty to conduct further inquiry  
16 before choosing to cease investigating.”)

17 Antieau was on notice that Gallegos suffered from a learning disability and had a  
18 history of substance abuse. Lay evidence to that effect was presented at the original  
19 sentencing; and although the trial court found the evidence insufficient to call for leniency,  
20 Antieau did not expand his investigation of those issues beyond what had already been  
21 presented. *Cf. Smith v. Stewart*, 189 F.3d 1004, 1007 (9th Cir. 1999) (finding ineffective  
22 assistance at resentencing where counsel did not present any new mitigating evidence). He  
23 did not, for example, contact Gallegos’s special education teachers, Ake and Randall, who  
24 could have provided further information about the nature of Gallegos’s learning disability.

25 Antieau was also on notice, through information provided by Nowatzki of the  
26 ACRP, that Gallegos reported injuring his head in a serious ATV accident and that  
27 witnesses had described Gallegos in the aftermath of the accident as “pale,” dazed,” and  
28 “in shock.” This information raised red flags that should have, but did not, prompt further



1 investigation into Gallegos's mental condition. Failure to undertake these further  
2 investigations rendered Antieau's performance deficient. *See Frierson v. Woodford*, 463  
3 F.3d 982, 991 (9th Cir. 2006) (finding deficient performance where counsel "ignored the  
4 red flag of possible brain damage caused by multiple childhood head injuries by failing to  
5 consult a neurologist and instead relied on the lay opinion of Frierson's parents"); *Earp*,  
6 431 F.3d at 1177–79 (finding petitioner was entitled to evidentiary hearing on his claim  
7 that counsel performed ineffectively by failing to present mitigating evidence, including  
8 evidence of organic brain damage resulting from a motorcycle accident); *Cunningham v.*  
9 *Zant*, 928 F.2d 1006, 1018 (11th Cir. 1991) (finding deficient performance where counsel  
10 was aware defendant had suffered a near-fatal head injury but failed to seek an expert  
11 assessment of the effects of the injury for purposes of mitigation).

12 The Supreme Court has found deficient performance in similar circumstances. In  
13 *Andrus*, for example, counsel was on notice that his client had been diagnosed with  
14 affective psychosis and may have had schizophrenia but did not pursue the evidence or  
15 present it at sentencing. 140 S. Ct. at 1882–83. The Supreme Court found counsel's  
16 performance deficient because "clearly, 'the known evidence would [have] le[d] a  
17 reasonable attorney to investigate further.'" *Id.* at 1883 (quoting *Wiggins*, 539 U.S. at 527).  
18 In *Porter*, counsel "ignored pertinent avenues for investigation of which he should have  
19 been aware," such as previous competency evaluations, and "thus failed to uncover and  
20 present any evidence of Porter's mental health or mental impairment," 558 U.S. at 40,  
21 including a possible brain abnormality, *id.* at 36. Like counsel in *Porter*, Antieau ignored  
22 pertinent avenues of investigation, including the notes from the ACRP which reported that  
23 Gallegos was injured in ATV accidents.

24 Federal circuit court opinions also support a finding of deficient performance. In  
25 *Williams v. Filson*, 908 F.3d 546 (9th Cir. 2018), the court found that "competent counsel"  
26 would have obtained records containing "conspicuous red flags" warranting a medical or  
27 mental health evaluation. *Id.* at 563. Those records would have shown a previous  
28 recommendation that the petitioner be evaluated for possible brain damage and records

1 showing that he had a history of substance abuse from the age of 14 and had suffered  
2 multiple head injuries, including from a car accident that left him unconscious for 15  
3 minutes and for which he never received medical treatment. *Id.* at 563–64. The Ninth  
4 Circuit, on de novo review, concluded that counsel’s “failure to have Williams evaluated  
5 by a competent medical or mental health professional” constituted deficient performance.  
6 *Id.* at 564. Antieau likewise failed to have Gallegos evaluated by appropriate medical or  
7 mental health experts despite being aware of his learning disability, history of substance  
8 abuse, and possible head injuries.

9 In *Caro*, 280 F.3d 1247, the Ninth Circuit held that counsel’s failure to investigate  
10 potential brain damage constituted ineffective assistance. Although counsel was aware of  
11 Caro’s “extraordinary history of exposure to pesticides and toxic chemicals,” he failed to  
12 adequately investigate that history and did not inform the experts who examined Caro of  
13 the facts that were known to him. *Id.* at 1255. Counsel did not seek an expert to assess the  
14 effect of the poisoning on Caro’s brain, and “[t]he only expert testimony presented relating  
15 to Caro’s mental health did not shed light on his brain damage.” *Id.* at 1255–57. Like  
16 Caro’s counsel, Antieau failed to present expert evidence shedding light on Gallegos’s  
17 mental status, including possible brain damage.

18 In *Littlejohn v. Trammell*, 704 F.3d 817 (10th Cir. 2013), the Tenth Circuit  
19 remanded the case for an evidentiary hearing on a claim of ineffective assistance of counsel  
20 at sentencing. Counsel at sentencing had presented only socio-psychological testimony  
21 about Littlejohn’s troubled childhood and its effect on his development. *Id.* at 861. In  
22 post-conviction proceedings, however, Littlejohn was examined by a psychiatrist, Dr. Saint  
23 Martin, who opined that he had a behavioral disorder resulting from neuro-developmental  
24 deficits caused by in utero exposure to his mother’s drug abuse. *Id.* at 861. The deficits  
25 existed in the structure and neuro-chemical function of the brain. *Id.* at 862.

26 The court of appeals noted that “[t]here were numerous indicators suggesting that a  
27 neurological evaluation could have uncovered evidence of organic brain damage.” *Id.* at  
28 862. Specifically, the court referred to a prior competency examination in state court, in

1 which an expert testified that Littlejohn had “neurological injury [originating] from birth”  
2 and cognitive problems of the kind seen in “a lot in head injured patients who are normal  
3 individuals” and become aggressive when their cortex is injured. *Id.*

4 In remanding the case, the court explained that:

5 [T]here is a very real likelihood that the decision of Mr. Littlejohn’s counsel  
6 to focus solely on mitigating evidence relating to the socioeconomic  
7 conditions of Mr. Littlejohn’s upbringing and to his psychological makeup—  
8 without even investigating whether there was some physical, brain-related  
condition that would account for Mr. Littlejohn’s behavior—amounted to  
constitutionally deficient performance.

9 *Id.* at 863. The court concluded that “there were patent ‘red flags’ in this case, pointing to  
10 a possible physiological explanation for Mr. Littlejohn’s violent and anti-social behavior.  
11 Dr. Saint Martin’s declaration suggests that in fact Mr. Littlejohn suffered from physical  
12 brain damage.” *Id.*

13 Like Littlejohn’s counsel, Antieau ignored red flags which, if pursued, could have  
14 revealed a “physical, brain-related” explanation for Gallegos’s conduct.

15 Finally, in *Bemore*, 788 F.3d at 1171–72, the Ninth Circuit held that counsel  
16 performed ineffectively at sentencing by failing to present sufficient evidence of the  
17 defendant’s mental condition. The court explained that counsel was on notice “that  
18 Bemore had periodic manic-like episodes; was a heavy drug user; and was severely beaten  
19 as a child in a manner and to a degree that brain damage could have resulted,” and was also  
20 aware, through the report of a psychologist, Dr. Fineman, that “Bemore suffered mild,  
21 diffuse organic impairment, and exhibited impaired reasoning skills, judgment, and ability  
22 to control his impulsivity.” *Id.* at 1171 (interior quotations omitted).

23 Despite this information, counsel “purposely truncated the inquiry into  
24 Bemore’s mental health.” *Id.* at 1171–72. She retained Dr. Fineman specifically to  
25 develop a theory explaining that Bemore’s drug use was the product of cultural  
26 pressures, “*not* to develop evidence of mental impairment.” *Id.* at 1172 (emphasis in  
27 original). “When Dr. Fineman reported that Bemore did suffer a number of mental  
28 impairments and possible disorders, and recommended further inquiry, she terminated his

1 involvement and put his report in the back of a drawer.” *Id.* Another expert testified about  
2 the effects of growing up in a family with chemical dependency but was not asked to  
3 conduct any psychological testing or to give an opinion about Bemore’s mental state at the  
4 time of the offense. *Id.* “The net result was that there was, except for Dr. Fineman’s fairly  
5 vague “organic impairment” assessment, and despite Dr. Fineman’s indications of  
6 possible, serious mental health issues, no definitive conclusion concerning either Bemore’s  
7 mental state at the time of the crime or his overall mental health diagnosis.” *Id.*

8 Antieau’s performance was similarly deficient. His truncated investigation, which  
9 included no expert analysis of possible brain dysfunction, left the sentencer with no  
10 evidence about Gallegos’s mental state at the time of the crime or his overall mental health.

11 Antieau did present lay evidence of Gallegos’s learning disability and substance  
12 abuse, but more was required. In *Bemore*, the court observed that “it is not enough just to  
13 present ‘extensive mitigating evidence’ where particularly persuasive evidence—  
14 especially evidence in the form of expert testimony—was omitted.” 788 F.3d at 1172  
15 (quoting *Caro*, 165 F.3d at 1227). The court elaborated that “it is not enough that some of  
16 the defense witnesses informed the jury of the facts that might *underlie* a mental health  
17 mitigation defense; ‘expert testimony to explain the ramifications of those experiences on  
18 [petitioner’s] behavior . . . is necessary.’” *Id.* (quoting *Caro*, 165 F.3d at 1227).

19 Antieau presented only the facts that might underlie a mental health mitigation  
20 defense—that Gallegos was learning disabled and attended special education classes and  
21 that he had a history of substance abuse. He omitted, however, any “expert testimony to  
22 explain the ramifications of those experiences” on Gallegos’s behavior. *Id.* Additional  
23 evidence about the brain-based nature of SLD and the effects on the brain of long-term  
24 substance abuse was available but Antieau did not pursue it. Likewise, Antieau was on  
25 notice of evidence that Gallegos suffered potential head injuries in ATV accidents, but he  
26 did not pursue that information either.

27 While Antieau’s decision not to pursue such evidence must be assessed for  
28 reasonableness, applying a heavy measure of deference to his judgment, *Wiggins* 539 U.S.

1 at 521, no reasonable basis for limiting his investigation appears in the record. No tactical  
 2 reason suggests itself, as Antieau successfully argued for a “full resentencing hearing” not  
 3 limited to evidence of impairment. (RT 10/24/94 at 32.) *Cf. Correll v. Ryan*, 539 F.3d  
 4 938, 951 (9th Cir. 2008) (“[T]here is no strategic excuse for failing to put on evidence in  
 5 support of statutory mitigating factors that the Arizona Supreme Court could have  
 6 considered in its independent re-weighing of aggravating and mitigating factors.”).

7 Respondents assert that “the tests, technology, and theories surrounding adolescent  
 8 organic brain damage that exist today, were not widely accepted in the scientific  
 9 community” in 1994. (Doc. 227 at 16–17.) This was not borne out by the testimony at the  
 10 evidentiary hearing. Dr. Heilbronner testified that Gallegos’s neuro-cognitive deficits  
 11 could have been “reliably assessed” in 1994 (RT 11/09/20 at 184); Dr. Fassler testified that  
 12 the effects of alcohol abuse were known in 1994 (RT 11/09/20 at 212, 215); and Dr.  
 13 Reschly testified that SLD and ADHD were both well understood as far back as the 1980s  
 14 (11/10/20 at 242.) Antieau simply ignored red flags that should have prompted additional  
 15 investigation. This constitutes deficient performance.

## 16 **2. Gallegos was prejudiced by resentencing counsel’s performance**

17 To prove prejudice under *Strickland*, Gallegos must “show that there is a reasonable  
 18 probability that, but for counsel’s unprofessional errors, the result of the proceeding would  
 19 have been different. A reasonable probability is a probability sufficient to undermine  
 20 confidence in the outcome.” 466 U.S. at 694.

21 In assessing prejudice, “the question is not whether a court can be certain counsel’s  
 22 performance had no effect on the outcome or whether it is possible a reasonable doubt  
 23 might have been established if counsel acted differently.” *Harrington v. Richter*, 562 U.S.  
 24 86, 111 (2011) (citing *Wong v. Belmontes*, 558 U.S. 15, 27 (2009) (per curiam)). Rather,  
 25 the question is whether it is “reasonably likely” the result would have been different. *Id.*  
 26 (quoting *Strickland*, 466 U.S. at 696.) “This does not require a showing that counsel’s  
 27 actions ‘more likely than not altered the outcome.’” *Richter*, 562 U.S. at 111–12 (quoting  
 28 *Strickland*, 466 U.S. at 693); see *Mann v. Ryan*, 828 F.3d 1143, 1157 (9th Cir. 2016) (en

1 banc) (“The Supreme Court considered and explicitly rejected the more-likely-than-not  
2 standard in *Strickland*.”). “The likelihood of a different result must be substantial, not just  
3 conceivable.” *Id.* at 112 (citing *Strickland*, 466 U.S. at 693).

4 To determine whether prejudice has been shown, the Court must “reweigh the  
5 evidence in aggravation against the totality of available mitigating evidence.” *Wiggins*,  
6 539 U.S. at 534. The question here, therefore, is whether there is a reasonable probability  
7 that the new evidence of organic brain damage, added to the evidence that was presented  
8 at resentencing, would have resulted in a life sentence.

9 The Court first notes that in determining whether Gallegos suffers from organic  
10 brain damage, it is not this Court’s role “to evaluate the evidence in order to reach a  
11 conclusive opinion.” *Correll*, 539 F.3d at 952 n.6. In *Correll*, the district court, after  
12 holding a nine-day evidentiary hearing, denied relief on Correll’s claim of ineffective  
13 assistance of counsel at sentencing. The Ninth Circuit reversed. The court faulted the  
14 district court for dismissing evidence of brain injury based on its “own evaluation of two  
15 conflicting experts.” *Id.* The court explained that: “Because the competing  
16 neuropsychologists who testified at the evidentiary hearing agreed that the evidence of  
17 brain injury was at least strong enough to deserve presentation at a sentencing hearing, we  
18 conclude that Correll’s evidence had at least a ‘reasonable probability’ of persuading an  
19 objective fact-finder.” *Id.*

20 Dr. Heilbronner opines that Gallegos suffered TBI as a result of ATV accidents.  
21 Respondents argue, with support from Dr. Boake, that there is no objective evidence that  
22 those injuries occurred and no support for Heilbronner’s diagnosis of cognitive disorder.  
23 The directive from *Correll*, however, suggests that it is not within this Court’s ambit to  
24 make a final credibility assessment of these competing experts as to whether or not  
25 Gallegos experienced TBI and as a result suffers from a cognitive disorder. Given the  
26 conflicting evidence and opinions, and the fact that SLD and the effects of substance abuse  
27 are also forms of organic brain damage, the Court concludes that “there existed a  
28 ‘reasonable probability’ that ‘an objective fact-finder’ in a state sentencing hearing would



1 have concluded, based on the evidence presented, that [Gallegos] had a brain injury that  
2 impaired his judgment at the time of the crimes.” *Id.* (quoting *Summerlin*, 427 F.3d 623 at  
3 643).

4 Organic brain damage is particularly compelling mitigation evidence. In *Caro*, 280  
5 F.3d at 1258, the Ninth Circuit emphasized the mitigating weight of evidence of  
6 “physiological defects” in the brain that affect behavior and cause “‘impulse discontrol’  
7 and irrational aggressiveness.” *Id.* The court found that “[b]y explaining that [Caro’s]  
8 behavior was physically compelled, not premeditated, or even due to a loss of emotional  
9 control, his moral culpability would have been reduced.” *Id.*; see *Abdul-Kabir v.*  
10 *Quarterman*, 550 U.S. 233, 241 (2007) (explaining that the “strength [of petitioner’s]  
11 mitigating evidence] was its tendency to prove that his violent propensities were caused by  
12 factors beyond his control—namely, neurological damage and childhood neglect and  
13 abandonment”); *Littlejohn*, 704 F.3d at 864 (“Evidence of organic mental deficits ranks  
14 among the most powerful types of mitigation evidence available.”).

15 In *Sears v. Upton*, for example, the Supreme Court found prejudice where counsel  
16 failed to present evidence of severe learning and behavioral disabilities, frontal lobe  
17 injuries, and brain damage from drug and alcohol abuse. 561 U.S. 945, 948–49 (2010). In  
18 *Caro*, the court found that counsel’s failure to present evidence of brain damage from  
19 exposure to neurotoxins undermined confidence in the jury’s selection of a death  
20 sentence. 280 F.3d at 1258. In *Correll*, the court found prejudice based on counsel’s failure  
21 to present evidence of brain injury which “could have colored Correll as an organically  
22 diseased and injured person who, through no fault of his own, lacks the ability to  
23 comprehend the immorality of his conduct.” 539 F.3d at 954. In *Summerlin*, the court  
24 found that the defendant was prejudiced by counsel’s failure to present “strong psychiatric  
25 evidence . . . of lack of impulse and emotional control and organic brain dysfunction.” 427  
26 F.3d at 641.

27 The Arizona Supreme Court has likewise held that evidence of brain damage is  
28 entitled to greater weight than other types of psychological disorder. See *State v. Walton*,



1 159 Ariz. 571, 588, 769 P.2d 1017, 1034 (1989) (“Mental impairments have far greater  
2 mitigating effect because they may evidence an inability of the defendant to control his  
3 conduct.”). In *State v. Stuard*, 176 Ariz. 589, 610, 863 P.2d 881, 902 (1993), the court  
4 reduced a death sentence based on mitigating evidence that the defendant suffered from  
5 organic brain damage that was a “major contributing cause of his conduct.” In *State v.*  
6 *Rockwell*, 161 Ariz. 5, 15, 775 P.2d 1069, 1079 (1989), the court reduced a death sentence  
7 based on the defendant’s youth and the effects of a motorcycle accident which resulted in  
8 a head injury that altered his behavior. *See also State v. Mauro*, 159 Ariz. 186, 208, 766  
9 P.2d 59, 81 (1988) (reducing sentence based on evidence of bipolar disorder, a “chemical  
10 disorder in the brain”); *State v. Graham*, 135 Ariz. 209, 213, 660 P.2d 460, 464 (1983)  
11 (reducing sentence based on valium intoxication and “neurological problems and brain  
12 damage”); *State v. Brookover*, 124 Ariz. 38, 41, 601 P.2d 1322, 1325 (1979) (sentence  
13 reduced based on evidence of a “prenatal neurological lesion” that disrupted the integration  
14 and storage of information in the brain).

15 The likelihood of prejudice in Gallegos’s case is magnified because the new  
16 information which Antieau failed to present would have supported a finding that Gallegos’s  
17 ability to conform his conduct to the requirements of the law was impaired. *See Rompilla*  
18 *v. Beard*, 545 U.S. 374, 392 (2005) (finding prejudice where counsel failed to present  
19 evidence of “organic brain damage” that impaired Rompilla’s “capacity to appreciate the  
20 criminality of his conduct or conform his conduct to the law”); *Summerlin*, 427 F.3d at 643  
21 (finding prejudice where omitted expert evidence suggested “a complete loss of impulse  
22 control that affected Summerlin’s ability to conform his conduct to the requirements of the  
23 law”).

24 Drs. Heilbronner, Fassler, and Reschly testified that Gallegos’s ability to control his  
25 conduct was affected by his brain dysfunction, whether the cause of that dysfunction was  
26 SLD, the effects of substance abuse, or TBI. Dr. Fassler also testified about Gallegos’s  
27 genetic and environmental predisposition to substance abuse. Because counsel failed to  
28 present expert testimony explaining the ramifications of Gallegos’s conditions, *Bemore*,

1 788 F.3d at 1172, the sentencer was not made aware that there was a brain-based  
2 explanation for Gallegos's conduct in committing the offenses—that the brain dysfunction  
3 evident in his learning disability and resulting from his history of substance abuse and  
4 probable TBI impaired his judgment, impulse control, maturity, and ability to stop a  
5 behavior once started, and left him susceptible to manipulation by others. The sentencer  
6 was likewise not informed that an adolescent's immature brain is affected more profoundly  
7 by damage resulting from substance abuse or head injuries. Again, the presence of an  
8 organic explanation for Gallegos's conduct constitutes powerful mitigation because it  
9 reduces his moral culpability. *See Caro*, 280 F.3d at 1257–58.

10 In sentencing Gallegos to death, the trial court rejected the A.R.S. § 13–703(G)(1)  
11 mitigating circumstance, finding that Gallegos had not shown that his capacity to  
12 appreciate the wrongfulness of his conduct or to conform his conduct to the requirements  
13 of law was significantly impaired. (RT 10/24/94 at 182.) There is a reasonable probability  
14 that this finding would have been different in light of the evidence of Gallegos's brain  
15 damage and its effects. The trial court considered but discounted Gallegos's learning  
16 disability because it affected his “math and spelling but not his reading or understanding”  
17 and did not show that he was “mentally deficient.” (*Id.* at 185.) There is a reasonable  
18 probability that this finding would have been different with evidence about the brain-based  
19 nature of SLD and its behavioral effects. Finally, evidence that Gallegos was predisposed  
20 to alcohol abuse might have affected the trial court's consideration of Gallegos's “history  
21 of drinking.” (RT 10/24/94 at 184–85.)

22 The fact that the crime here was particularly disturbing does not alter this analysis.  
23 The Ninth Circuit has “held consistently that even in cases involving particularly heinous  
24 murders, a defendant can be prejudiced by an attorney's failure to investigate and present  
25 mitigating evidence.” *Lambright*, 490 F.3d at 1127 (collecting cases).

26 The Court concludes that there is a reasonable probability that the outcome of the  
27 resentencing would have been different if Antieau had presented evidence that Gallegos  
28

1 suffered from organic brain damage, including expert testimony describing the brain-based  
2 nature of his SLD and the effects of long-term alcohol abuse and TBI.

3 This conclusion finds support in the Ninth Circuit's 2016 opinion. *Gallegos*, 820  
4 F.3d 1013. There the court of appeals, applying AEDPA deference, denied Gallegos's  
5 claim of ineffective assistance of counsel at sentencing.<sup>11</sup> *Id.* The court found that  
6 additional evidence of Gallegos's history of substance abuse, tendency to be a follower,  
7 and learning disability would have been cumulative to the evidence presented at  
8 resentencing. *Id.* at 1038. The additional evidence the court considered was that presented  
9 in Gallegos's post-conviction proceedings and was "identical to the profile at the time of  
10 resentencing."<sup>12</sup> *Id.*

11 After denying the claim, the court commented that if Gallegos had been sentenced  
12 by a jury instead of the trial judge, "his sentence may very well have been different." *Id.*  
13 at 1039. Although the crime was "unspeakable," the court found that "it is nothing short  
14 of remarkable that the two detectives in charge of his case both testified *against* imposition  
15 of the death penalty, especially considering that neither officer had ever so recommended.  
16 Perhaps a jury would not unanimously have sentenced Gallegos to die after hearing that  
17 the two officers most familiar with his case found such a punishment unwarranted." *Id.*  
18 The court also noted that "Gallegos was barely eighteen years old at the time of the crime  
19 and had no serious criminal background. A jury could have viewed the horrendous offense  
20 as aberrational and declined to impose the death penalty." *Id.*

21 Thus, in the Ninth Circuit's view, a juror could have recommended a life sentence  
22 based on the mitigating evidence presented in state court, which consisted of lay testimony  
23

24  
25 <sup>11</sup> Antiterrorism and Effective Death Penalty Act of 1996. Under 28 U.S.C. § 2254(d)(1),  
26 a habeas petitioner is not entitled to relief unless the state court's decision on the merits of  
27 his claim was contrary to or an unreasonable application of clearly established law federal  
28 law. As noted previously, in reviewing such a claim, the federal habeas court is limited to  
the record before the state court. *Cullen v. Pinholster*, 563 U.S. 170, 185 (2011).

<sup>12</sup> The court held an evidentiary hearing during the post-conviction proceedings at which  
trial counsel and Gallegos testified. (*See* RT 12/01/00.)

1 outlining Gallegos's substance abuse, learning disability, and tendency to be a follower,  
2 together with the detectives' recommendations of leniency and Gallegos's youth.

3 Now, however, the totality of the case in mitigation includes new evidence of  
4 organic brain damage. Adding this compelling evidence to the mitigating information  
5 already presented is sufficient to undermine this Court's confidence in the outcome of the  
6 resentencing proceedings. *Strickland*, 466 U.S. at 694.

7 **VIII. CONCLUSION**

8 Reviewing the claims de novo, the Court finds that resentencing counsel Antieau  
9 performed ineffectively by failing to present evidence of Gallegos's organic brain damage.

10 Accordingly,

11 (1) IT IS HEREBY ORDERED Gallegos's Petition for a Writ of Habeas Corpus  
12 is **GRANTED**.

13 (2) As provided in the judgment filed herewith, the State of Arizona is directed  
14 to vacate Gallegos's death sentence and impose a lesser sentence unless it notifies this  
15 Court, within 120 days from the entry of this Judgment, that it has initiated a new  
16 sentencing hearing or vacated Gallegos's sentence and imposed a lesser sentence in  
17 accordance with state and federal law.

18 (3) IT IS FURTHER ORDERED that the Clerk of Court close this case.

19 (4) IT IS FURTHER ORDERED that the Clerk of Court forward a copy of this  
20 Order to Janet Johnson, Clerk of the Arizona Supreme Court, 1501 W. Washington, Suite  
21 402, Phoenix, Arizona, 85007-3329.

22 Dated: December 7, 2020.

23  
24 

25 \_\_\_\_\_  
26 Neil V. Wake  
27 Senior United States District Judge  
28